Supreme Court, U. S.
FILED
MAY 29 1975

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

NO. 74-1506

DONALD M. FISHER and MELVIN P. FISHER, as Trustees under the Last Will and Testament of BERNARD FISHER, deceased, ROSLYN MILLER, BERNICE GOLD and PHILIP ADLER,

Petitioners,

v.

CITY OF SYRACUSE and SYRACUSE URBAN RENEWAL AGENCY,

Respondents.

SIDNEY BLUMAN, individually and as Executor of the Last Will and Testament of ISRAEL HURWITZ, deceased,

Petitioner,

v.

CITY OF SYRACUSE and SYRACUSE URBAN RENEWAL AGENCY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, FOURTH DEPARTMENT

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May 26, 1975.

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PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, FOURTH DEPARTMENT

The petitioners respectfully pray that a writ of certiorari issue to review the judgments and opinions of the Appellate Division of the Supreme Court of the State of New York, Fourth Department, entered in this proceeding on December 12, 1974.[1] This was the highest

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[1] The Court of Appeals of the State of New York, by order dated March 19, 1975, denied petitioners' motion for leave to appeal.

Court of the State of New York which considered the case on the merits.

Opinions Below

The opinion of the Appellate Division and the concurring opinion of Goldman, *J.*, dated December 12, 1974, are reported in 46 A.D.2d 216, 361 N.Y.S.2d 773, and appear in the Appendix hereto. An opinion was rendered at Special Term of Supreme Court, Onondaga County, dated March 27, 1974, reported in 78 Misc.2d 124, 355 N.Y.S.2d 239, and appears in the Appendix hereto. This decision was rendered on a motion to dismiss the complaints.

Jurisdiction

An order of the Court of Appeals of the State of New York denying petitioners leave to appeal to the Court of Appeals was entered March 19, 1975 and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1257.

Question Presented

Where a condemnor includes certain property in a proposed improvement area, such as a renewal area, and over a period of many years condemns many parcels contiguous to and in the vicinity of such property, thereby creating what is known as "condemnation blight," resulting in devaluation of the property, loss of rental income, payment of excessive insurance premiums and expenses to protect the property from vandalism, even though the property has not been "taken" either *de facto* or *de jure*, may not the condemnor be held liable for such damages

on the theory of violation of the due process and equal protection clauses of the Fourteenth Amendment?

Constitutional Provisions Involved

Fourteenth Amendment of the United States Constitution

> "* * * nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Statement of the Case

Both actions are brought on the theory of "condemnation blight" for damages by reason of the diminution in property value, lost rental income and increased and unrequited costs of maintenance and protection of property.

The petitioners, plaintiffs in each of the actions herein, are respectively the owners in fee of certain parcels of improved property more specifically described in the complaints.

The complaints allege as follows:

> (a) Beginning in 1962 plans, affecting the area in which their properties are located, were commenced for a comprehensive urban renewal in the form of a General Neighborhood Renewal Plan. In April of 1964 the Common Council of the City of Syracuse approved an ordinance authorizing City sponsorship of an application to the Federal Government for a planning grant and thereafter received a grant. On September 12, 1966, the Common Council approved an initial partial acquisition for the purposes of the plan. On October 14, 1966, the City of Syracuse submitted a

plan of acquisition of another part of the renewal area, which plan included the plaintiffs' properties. On June 10, 1969, the Common Council of the City of Syracuse changed the project from General Neighborhood Renewal Plan to Neighborhood Development Plan and on June 22, 1969, the Common Council approved the project. For more than ten years, the above mentioned events and activities associated with such events were the subject of wide and frequent publicity in the newspapers in the City of Syracuse and the subject of frequent correspondence and conferences between the parties to these actions.

(b) Pursuant to the foregoing plans and authorizations the respondents have acquired title to many parcels in the area and to several parcels in each of the blocks in which the petitioners' respective properties are located. Many buildings have been demolished and others have been boarded up.

(c) As a result of the inordinately long and dilatory tactics of the respondents, the vicinity of the petitioners' properties has suffered a condemnation blight which has transformed the area into one which is highly undesirable for either residential or commercial purposes. The area has become a high-crime area, vandalism is rampant, and it is not safe to live or work there. Both residential and commercial tenants have moved from the area, the petitioners have lost substantial amounts of rental income, they have been placed in a special insurance pool which forced them to pay excessive premiums, they have been compelled to expend monies to protect the property from vandalism, and their property has been drastically reduced in value.

(d) Although petitioners' properties are in the renewal area and although the Bluman properties throughout the foregoing periods have been designated for acquisition, no proceedings have been commenced to condemn the said properties nor has any step been taken to compensate the petitioners for the damage which they have suffered as a result of the foregoing action of the respondents.

The constitutional question involved was raised in the complaints which are included in the Appendix hereto.

Reasons for Granting the Writ

The actions of the respondents, imposing a condemnation blight upon the petitioners for an unreasonable period of time, constitute a violation of the due process and equal protection clauses of the Fourteenth Amendment to the Federal Constitution.

The sole issue in these causes is purely one of law. The actions at bar are not based upon an alleged *de facto* taking nor do the petitioners seek to compel the respondents to institute proceedings for the condemnation of their properties. They seek merely to recover damages by reason of a violation of due process and the equal protection of the laws.

The facts are undisputed and show a classic example of condemnation blight as a result of urban renewal activities by the respondents extending over a period in excess of eleven years. The area has for many years been rendered undesirable for either residential or commercial purposes. It is now a high-crime area; vandalism is rampant; and it is not safe to live or work there. As a result both

residential and commercial tenants have moved from the area.[2]

The foregoing undisputed conditions have resulted in the following conceded items of damage:

(1) Loss of rental income;

(2) Excessive insurance premiums;

(3) Unrequited expenses to protect the property from vandalism; and

(4) Reduction in value of the properties.

A. ***As to reduction in value of the properties.***

Despite the depreciation in value of the properties, if ultimately the property is acquired by eminent domain, the law is established that the condemnee will be made whole by allowing the value on the date of the taking as unaffected by the depreciating influence of the condemnation blight. Thus, in *City of Buffalo* v. *J.M. Clement Co. Inc.*, 28 N.Y. 2d 241, 321 N.Y.S. 2d 345, 269 N.E. 2d 895 (1971), the Court of Appeals said (28 N.Y. 2d, at 255; 321 N.Y.S. 2d, at 357):

> "In such a case, compensation shall be based on the value of the property at the time of the taking, as if it had not been subjected to the debilitating effect of a threatened condemnation."

[2] See *City of Cleveland* v. *Hurwitz*, 19 Ohio Misc. 184, 190, 249 N.E. 2d 562, 567 (1969), in which the Court said: "The central issue here is not the willful or intentional acts of the city, it is the natural and probable consequence of the acts or the failure to act on the part of the city. It is the cumulative result of many things, each in itself that might not have been totally harmful, but when impacted all together have the full force of destruction of the property * * *."

This is all well and good insofar as properties so affected in the area are ultimately actually taken if the owners have managed to survive until that date.[3] But what of those owners, such as the petitioners herein, whose properties are similarly affected depreciatively for the very same reasons, whose property has not been taken and may never be taken?

Here are parcels in the renewal area which have been adversely affected value-wise in precisely the same manner, by the same forces and for the same reasons as those parcels which have been taken. Is this the equal protection of the laws? And do not the due process factors which protect owners whose property is taken also protect those whose property is not taken?

This Court should give due regard to the basic constitutional concept that the Bill of Rights was deliberately added to the Federal Constitution as a means of guaranteeing the individual's *personal* rights. Indeed, Justice Holmes made the well-known observation that constitutions deal "with persons, not with tracts of land" (*Boston Chamber of Commerce* v. *Boston*, 217 U.S. 189, 195, 54 L.E.d. 725, 30 S.Ct. 459 [1910]). Only recently Justice Stewart, in *Lynch* v. *Household Finance Corp.*, 405 U.S. 538, 551-2, 31 L.Ed. 2d 424, 434-5, 92 S.Ct. 1113, 1121-2 (1972), said:

> "The federal courts have been particularly bedeviled by 'mixed cases' in which both the personal and property rights are implicated, and the line between them has been difficult to draw with any consistency or principled objectivity. The case before us presents a

[3] Compare *Sarff* v. *City of Whittier*, 8 Cal. 3d 39, 104 Cal. Rptr. 1, 500 P. 2d 1345 (1972), where the debilitating effect of pre-condemnation blight caused the owner to lose his title by foreclosure prior to the taking by the city.

good example of the conceptual difficulties created by the test.

"Such difficulties indicate that the dichotomy between personal liberties and property rights is a false one. *Property does not have rights. People have rights. The right to enjoy property without unlawful deprivation, no less than the right to speak or the right to travel, is, in truth, a 'personal' right, whether the 'property' in question be a welfare check, a home or a savings account. In fact, fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other. That rights in property are basic civil rights has long been recognized.*" (Emphasis added.)

Even more recently, in dealing with the concept of just compensation, this Court in *Almota Farmers Elevator & Warehouse Co.* v. *United States*, 409 U.S. 470, 478, 35 L.Ed. 2d 1, 10, 93 S.Ct. 791, 797 (1973), said:

"'The constitutional requirement of just compensation derives as much content from the basic equitable principles of fairness, United States v. Commodities Trading Corp., 339 U.S. 121, 124, 70 S.Ct. 98, 94 L.Ed. 525 (1950), as it does from technical concepts of property law.' United States v. Fuller, 409 U.S. 488, at 490, 35 L.Ed. 16, 20, 93 S.Ct. 801, 803."

B. *As to the incidental damages—loss of rental income, excessive insurance premiums and unrequited expenses to protect the property from vandalism.*

The further question arises as to economic losses produced by the blight other than the depreciation in value of the property itself—specifically, the loss of rents by reason

of the fact that tenants have failed to renew their leases and have vacated the premises, and the fact that the petitioners have been compelled, despite the absence or sharp reduction of income, to continue payments for taxes, increased insurance premiums, interest on mortgages, and increased costs of maintenance.

This is not to say that condemnation blight is equivalent to a *de facto* taking.[4] The point here is that the rationale which permits the valuation of the property to be made as of the date of formal acquisition, excluding consideration of the affirmative value-depressing acts implicit in condemnation blight, also justifies the consideration of lost rentals and other expenses directly attributable to the same cause.

If the owner is to be made truly whole, recognition should be given to the fact that condemnation blight can and does bring about two elements of damage:

(1) Diminution in the value of the property taken: and

(2) Loss of rentals and subjection to added expenses and costs during the period from the onset of condemnation blight to the time of the formal taking.

The courts have protected the owner as to the first element of damage, at least where the property is taken, but have spoken only sparsely as to the second. Disposition of the first element of damage by preserving the value against the debilitating effect of condemnation blight only accomplishes half the job of protecting the owner where

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[4] See, however: *Foster* v. *City of Detroit, Michigan*, 254 F.Supp. 655, 661-664 (Dist. Ct., E.D. Mich., S.D., 1966), aff'd 405 F.2d 138, 144 (6th Cir., 1968); *Drake's Bay Land Co.* v. *United States*, 424 F.2d 574 (Ct.Cl., 1970); *Amen* v. *City of Dearborn*, 363 F. Supp. 1267 (Dist. Ct., E.D., Mich., S.D., 1973).

there have been serious and substantial interim damages caused by the blight. Compensating the owner for the full undepressed *value* of his property does not compensate him for the lost *fruits* of that property while he remains as owner of the property and for the unrequited expenses he is put to in order to *preserve* his property until it is formally taken by the condemnor.

The rationale justifying the compensability of incidental damages generally, and rental losses and expenses specifically, under the "just compensation" clause and the rejection of the old concept of noncompensability under the "property" clause is fully supported by a recent decision of the Wisconsin Supreme Court—*Luber* v. *Milwaukee County*, 47 Wis. 2d 271, 177 N.W. 2d 380 (1970).

At issue in this case was the constitutionality of a new statute which allowed a limited recovery of pre-taking rental losses. The Court held that, since the owner had a constitutional right to the recovery of such loss, the statute was unconstitutional in that it limited such right. The Court said (177 N.W. 2d, at 383):

> "It is the respondents' position that compensation should be awarded for the physical property taken and that such was done when they awarded the fair market value of appellants' property. Respondents also maintain that 'consequential' damages, except as are provided by the legislature are *damnum absque injuria* and are to be suffered in legal silence. They justify the limitations of sec. 32.19(4), Stats., by, in effect, saying that what the legislature giveth, the legislature can taketh away.
>
> "Although such justification ignores the possibility that compensation for rental loss is a constitutional necessity rather than a legislative dole, much authority

> exists for the proposition that the constitution does not require compensation for consequential losses."

The Court considered the "property" concept, saying (177 N.W. 2d, at 384):

> "The question often before this court is thus whether there has in effect been a taking. In answering this question a court of necessity must define property and determine what *interests* in property are significant enough to be protected from a taking without compensation. In the instant case there is no question that the appellants' entire building was taken. The question is whether there are any *interests*, other than the building itself, for which appellants are constitutionally entitled to compensation.
>
> "Although the rule of no recovery for incidental or consequential damages has always prevailed in this country, it has been severely attacked by many legal scholars. Part of the reason for such attacks is that 'just compensation' clauses have often been interpreted to require compensation only when property is damaged, as distinguished from damages to the property owner. In other words, 'just compensation' has been considered an *in rem* rather than an *in personam* right.
>
> "It is the opinion of some writers that the fair market value standard of compensation . . . erroneously analyses the condemnor-condemnee relationship in terms of existing real and personal property concepts without regard to economic implications of the situation . . .
>
> ". . . In theory, the market value standard is directed toward compensating the condemnee for the *physical* property loss suffered; thus it generally excludes

recompense for incidental losses—losses typified by damage to or destruction of good will, expenses incurred in moving to a new location and profits lost because of business interruption or inability to relocate. In denying these losses, courts have recognized that such action constitutes a derogation of the indemnity principle and makes 'harsh' law. Nonetheless, the practice continues, justified by reasoning which, upon critical examination, reflects dubious wisdom and logic.

"We think that under property concepts one's interest in rental income is such as to deserve compensation under the 'just compensation' provision of the Wisconsin Constitution." (Emphasis added.)

Finally, the Court concluded (177 N.W. 2d, at 386):

"We believe that one's interest in rental loss is such as is required to be compensated under the 'just compensation' clause of art. I, sec. 13, Wis. Const. Sec. 32.19 (4), Stats., insofar as it limits compensation for the taking of such interest is in conflict with the state constitution. The rule making consequential damages *damnum absque injuria* is, under modern constitutional interpretation, discarded and sec. 32.19 (4), Stats., insofar as it limits compensation is invalid."

The Courts below attempted to distinguish the *Luber* case from the cases at bar by stating that the cited case involved an interpretation of "just compensation". But that is exactly the point we make for compensability. Wisconsin, like New York, is a "taking" state (Wis. Const. Art. I, sec. 13). The thrust of the *Luber* case is a shift from emphasis on the "taking" clause to emphasis on the "just compensation" clause—a shift from consideration of "property" *per se* to consideration of the "rights of owners" to

recover for real and actual losses which result from governmental action even though that action falls short of taking in the technical legal sense.

Even more recent than the *Luber* case is the decision of the California Supreme Court in *Klopping* v. *City of Whittier* and *Sarff* v. *City of Whittier*, 8 Cal. 3d 39, 104 Cal. Rptr. 1, 500 P. 2d 1345 (1972). These were actions in inverse condemnation for damages based on the original intent to condemn and on the resolution abandoning the condemnation proceeding and simultaneously announcing the city's intention to resume eminent domain action in the future.

The plaintiffs claimed that the fair market value of their properties declined as a result of the defendant's two announcements of intent to condemn made prior to instituting eminent domain proceedings. They contended also that because of the condemnation cloud hovering over their lands, they were unable fully to use their properties and that this damage, reflected in loss of rental income, should be recoverable. The Court agreed, holding that the test of liability was "the adverse economic effect of pre-condemnation publicity" (500 P. 2d, at 1351) rather than the *de facto* concept.

Responding to the owners' additional contention that they were unable fully to use their properties and thereby suffered a loss of rental income, the Court said (500 P.2d, at 1356):

"If as a result of precondemnation statements rental income is lost, the anticipated rental income would be diminished and a decline in the fair market value would follow. While we reiterate that the valuation date set statutorily at the issuance of the summons remains

intact, if the steps taken toward condemnation are to be disregarded when the condemnor acts reasonably, the condemnee must be compensated for loss of rental income attributable to such precondemnation publicity."

Certainly, in the case at bar this Court should find no difficulty, under the criterion of unreasonable delay, in finding liability. For a period in excess of eleven years the petitioners have been in limbo; their property has been sterilized; and all of the adverse effects of the dark cloud of condemnation blight have brought them economic ruin.

Perhaps the trend to greater recognition of these very real actual losses can be summerized in the words of Professor Donald G. Hagman, of U.C.L.A., who said:

"Perhaps further recognition that property has no feelings and that it is the dislocated owners and tenants who should be paid personal damages in addition to real property damages will lessen *property* blight." (Hagman, "Planning [Condemnation] Blight, Participation and Just Compensation: Anglo-American Comparisons, "4 Urban Lawyer, No. 3, pp. 434, 460 [Summer 1972]. Emphasis in the original.)

Manifesting this trend is the recent Connecticut case of *Levine* v. *City of New Haven,* 30 Conn. Sup. 13, 294 A. 2d 644 (1972), which involved, among others, causes of action for damages by reason of violations of the due process and equal protection clauses of the constitution.

In sustaining the complaint, the Court said (204 A. 2d, at 645):

"This court is of the opinion that if long periods of time elapse after initial condemnation proceedings and

there is no 'taking' for as long as, in this case, nine years, the property owner has a constitutional right to have his claim litigated.

"There is no question that property located within redevelopment project areas suffers drastically and that governmental authorities should minimize property owners' monetary losses as well as their frustrations. * * *

"The issue was clearly defined in *Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. 393, 413, 43 S.Ct. 158, 159, 67 L.Ed. 322: 'Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law. As long recognized some values are enjoyed under an implied limitation and must yield to the police power. *But obviously the implied limitation must have its limits, or the contract and due process clauses are gone.* One fact for consideration in determining such limits is the extent of the diminution. When it reaches a certain magnitude, in most if not in all cases there must be an exercise of eminent domain and compensation to sustain the act. So the question depends upon the particular facts.'" (Emphasis added.)

The conceded facts in the case at bar clearly establish that the magnitude of the damages has reached a degree of severity warranting compensation. Special Term was in error when it characterized the cited case as one based on a "*de facto* taking" because the action was in the form of an inverse condemnation proceeding. The rationale of the case evinces a cause of action (inverse condemnation) based on "condemnation blight", not on a "*de facto* taking".

The Court below, in concluding that a "taking" was the *sine qua non* of a cause of action, relied on three cases—*Danforth* v. *United States*, 308 U.S. 271, 84 L.Ed. 240, 60 S.Ct. 231 (1939); *City of Buffalo* v. *J. W. Clement Company*, 28 N.Y. 2d 241, 321 N.Y.S. 2d 345, 269 N.E. 2d 895 (1971); and *Sayre* v. *City of Cleveland*, 493 F.2d 64 (6th Cir. 1974).

But *Danforth* involved an alleged taking of property. The Court agreed with the respondents that there had been no taking. *Danforth*, however, is distinguishable from the case at bar in that it involved an alleged act of eminent domain and liability was predicated on an eminent domain concept under the eminent domain provision of the constitution, whereas, in the case at bar the petitioners expressly disavow the concept of taking, do not press their claim on an eminent domain basis or under the eminent domain provision of the constitution, but lay their claims on a violation of due process, an entirely separate constitutional right. The latter has never before been argued in this Court.

The *Clement* case, too, involved eminent domain, not due process.

Sayre v. *City of Cleveland, supra,* concluded with the statement (493 F.2d, at p. 70):

> "[T]here is no de facto taking of properties which have decreased in value because of an urban renewal project unless there is a physical invasion, damage or injury, or a restraint of some type, or action by the City to appropriate such properties."

The entire rationale of the *Sayre* case, although nominally considered in a "due process" frame, is based on the presentation of a claim predicated on a "de facto" taking, an eminent domain concept.

By citing the foregoing cases the Court below has begged the issue, not met it. The Court below has concluded that there has been no taking in the case at bar and that a taking is essential to liability. We agree, although there is authority to the contrary, that there has been no taking. We allege that fact in our complaints. But we assert that he conceded facts of this case have resulted in conceded substantial damages and that the respondents are liable for such damages, not under the eminent domain provision of the Constitution, but under the due process clause.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Appellate Division of the Supreme Court of the State of New York, Fourth Department.

Respectfully submitted,

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APPENDIX

Opinion of Appellate Division, Fourth Department, 46 A.D.2d 216, 361 N.Y.S.2d 773

DONALD M. FISHER et al., Appellants, v. CITY OF SYRACUSE and Syracuse Urban Renewal Agency, Respondents. Appeal No. 1.

SIDNEY BLUMAN, Individually and as Executor of the Last Will and Testament of Isabel Hurwitz, Deceased, Appellant, v. CITY OF SYRACUSE and Syracuse Urban Renewal Agency, Respondents. Appeal No. 2.

Supreme Court, Appellate Division, Fourth Department.

Dec. 12, 1974.

Before:

MOULE, *J.P.*, and
CARDAMONE, SIMONS, MAHONEY and GOLDMAN, *JJ.*

PER CURIAM:

Appellants seek damages for the diminution in value of their properties and for the increased expense of maintaining them which they allege result from the acts of the City of Syracuse.

The properties are located within an area approved for urban renewal as a part of the City's General Neighborhood Renewal Plan. They were subsequently designated for acquisition by the Common Council. Although the plan was adopted more than 10 years ago, the properties have not been taken and it is claimed that substantial damage has resulted during the interim from this threat of condemnation. Special Term held that in the absence of a "taking" the appellants were not entitled to damages from

the City and dismissed the complaints for failure to state a cause of action (78 Misc.2d 124, 355 N.Y.S.2d 239). We affirm that decision (see Danforth v. United States, 308 U.S. 271, 60 S.Ct. 231, 84 L.Ed. 240; City of Buffalo v. Clement Co., 28 N.Y.2d 241, 321 N.Y.S.2d 345, 269 N.E.2d 895; and cf. opinion at the Appellate Division, 34 A.D.2d 24, 311 N.Y.S.2d 98). Furthermore, without an actual or *de facto* taking of the property the appellants are not entitled to be compensated for damages under the due process and equal protection clauses of the State and Federal Constitutions (see Sayre v. City of Cleveland, 6 Cir., 493 F.2d 64). The judgments should be affirmed.

Judgment affirmed without costs.

MOULE, *J.P.*, and CARDAMONE, SIMONS and MAHONEY, *JJ.*, concur.

GOLDMAN, *J.*, concurs in the following Opinion.

GOLDMAN, *Justice* (concurring):

I concur in affirmance but feel constrained to point out a a substantial wrong which has been visited upon appellants. The facts are not in dispute.

The properties owned by both plaintiffs are situated within a 101 block area within the City of Syracuse designated as the Syracuse Hill Neighborhood Development Program and there are over 1,600 individual parcels of land within the area. In 1962 the Syracuse Urban Renewal Agency, a Department of the City, commenced a comprehensive urban renewal study and made renewal plans for the area in question. The Common Council of the City approved an ordinance authorizing an application by the

City to the federal government for a planning grant for the urban renewal project. On September 12, 1966 the Common Council approved an initial partial acquisition of properties. On October 14, 1966 the City submitted a plan of acquisition for a portion of the renewal area, which plan included the property of appellant Bluman but did not include the property of appellants Fisher. Although the City has acquired title to many of the properties in the area, no proceeding has been commenced to condemn appellants' properties and no compensation has been paid to them.

Special Term found that:

> "It is undisputed that for more than ten years the above events and activities associated therewith were the subject of wide and frequent publicity in the news media in the City of Syracuse and were the subject of frequent correspondence and conferences between the parties in both of the above captioned actions."

In furtherance of the plan many buildings were demolished and others were boarded up in the immediate area where appellants' properties are located. Appellants brought these actions to recover damage for the diminution in property values because of the "condemnation blight" and also for the increased expense of maintaining the properties during this long period of activity by the City. Although there was no "taking", appellants contend that the refusal to grant them "just compensation" is a denial of due process and equal protection guaranteed by the Constitutions of the United States and the State of New York.

Special Term recognized the damages suffered by appellants and stated that the decision it must make was "harsh" in its effect on these property owners. Special Term felt bound, as we do, by Article I, section 7(a) of the State Constitution which specifically limits "just compensation" to property "taken". Our highest State court has clearly recognized this limitation in several decisions and particularly in City of Buffalo v. Clement Co., 28 N.Y.2d 241, 321 N.Y.S.2d 345, 358, 269 N.E.2d 895, 904. No good purpose can be served by citation of the numerous Supreme Court decisions which deal with the question of "just compensation". Danforth v. United States, 308 U.S. 271, 60 S.Ct. 231, 84 L.Ed. 240 is supportive for the determination by Special Term. That case succinctly presents the limitations which constitutionally restrict compensation for "taking" stating, at page 285, 60 S.Ct. at page 236, that "[a] reduction or increase in the value of property may occur by reason of legislation for or the beginning or completion of a project. Such changes in value are incidents of ownership. *They cannot be considered as a 'taking' in the constitutional sense*" (emphasis supplied). Special Term asserted that although it was "sympathetic to the plight of the plaintiffs * * * the principle of *damnum absque injuria* prevails". An eminent jurist of our State, Justice Howard T. Hogan, who has for many years presided almost exclusively over condemnation and appropriation cases, expressed my position on this principle when he wrote in Matter of County of Nassau [Lido Blvd.], 71 Misc.2d 554, 562, 336 N.Y.S.2d 566, 575 that "[t]he doctrine of *damnum absque injuria* to me has always been an immoral, illogical concept and should be declared illegal". It is of little comfort to tell these appellants that, "notwithstanding the

agreed fact that the City has dragged its heels for an inordinately long time (now ten years and into the indefinite future), you have been damaged but that damage is without wrong. True, your properties are now in a vast waste land, without tenants, neither desirable for residential nor commercial use, deteriorating daily but, unfortunately, under the present state of the law you have no recourse". This was the basis of our decision in City of Buffalo v. Clement Co., 34 A.D.2d 24, 28-32, 311 N.Y.S.2d 98, 102-107, which the Court of Appeals held (28 N.Y.2d 241, 257, 321 N.Y.S.2d 345, 358, 269 N.E.2d 895, 904, *supra*) is not the law in this State.

The sole purpose for this writing is the hope that the Legislature will consider the dilemma of these property owners, and literally hundreds of others similarly affected during these days of urban renewal, and will adopt legislation recommending amendment of our State Constitution. Substantially more than half of our sister states, among which are such significant jurisdictions as California, Illinois, Massachusetts and Pennsylvania, now make provision for compensation for property "taken or damaged". The New York State Constitutional Convention of 1967 proposed a new Constitution which contained in Article 1, section 7(a) the provision that "[P]rivate property shall not be taken or damaged, as such latter term is defined by law, without just and timely compensation". Since the refusal of the electorate to adopt the new Constitution, the Legislature has been taking action on these provisions on which there is a consensus as to their desirability. I respectfully suggest to the Legislature that the subject of this opinion is a matter which should be given prompt and favorable consideration.

Judgment Appealed From—Fisher Case

STATE OF NEW YORK
SUPREME COURT

COUNTY OF ONONDAGA

Case #1

DONALD M. FISHER and MELVIN P. FISHER, as Trustees under the Last Will and Testament of BERNARD FISHER, Deceased; ROSLYN MILLER; BERNICE GOLD and PHILIP ADLER,

Plaintiffs,

—v.—

CITY OF SYRACUSE and SYRACUSE URBAN RENEWAL AGENCY,

Defendants.

A motion having been made by the defendants for judgment dismissing the complaint in the above-captioned action pursuant to CPLR 3211, and the motion having regularly come on to be heard at a Special Term of this court on the 15th day of January, 1974, and the defendants appearing by Harold T. Limpert, and the plaintiffs, appearing by Raphael, Searles, Vischi & Sackman, Julius L. Sackman, as counsel, and the motion having been granted and a memorandum decision dated March 27, 1974, directing that the complaint in the above entitled actions be dismissed and an order granting said motion having been filed and entered May 15, 1974,

Judgment Appealed From—Fisher Case

Now, on motion of Harold T. Limpert, attorney for the defendants, it is

ADJUDGED, that the defendants have judgment against the plaintiffs dismissing the complaint.

Judgment signed this 24 day
of May, 1974.

/s/ JAMES D. GORHAM
Acting Onondaga County Clerk

Judgment Appealed From—Bluman Case

STATE OF NEW YORK
SUPREME COURT

COUNTY OF ONONDAGA

Case #2

SIDNEY BLUMAN, Individually and as Executor of the Last Will and Testament of ISRAEL HURWITZ, Deceased,

Plaintiff,

—v.—

CITY OF SYRACUSE and SYRACUSE URBAN RENEWAL AGENCY,

Defendants.

A motion having been made by the defendants for judgment dismissing the complaint in the above-captioned action pursuant to CPLR 3211, and the motion having regularly come on to be heard at a Special Term of this court on the 15th day of January, 1974, and the defendants appearing by Harold T. Limpert, and the plaintiff appearing by Raphael, Searles, Vischi & Sackman, Julius L. Sackman, as counsel, and the motion having been granted and a memorandum decision dated March 27, 1974, directing that the complaint in the above-entitled actions be dismissed and an order granting said motion having been filed and entered May 15, 1974,

Now, on motion of Harold T. Limpert, attorney for the defendants, it is

Judgment Appealed From—Bluman Case

ADJUDGED, that the defendants have judgment against the plaintiff dismissing the complaint.

Judgment signed this 24 day
of May, 1974.

/s/ JAMES D. GORHAM
Acting Onondaga County Clerk

Opinion of Special Term, Onondaga County, 78 Misc.2d 124, 355 N.Y.S.2d 239

DONALD M. FISHER *et al.*, *Plaintiffs* v. CITY OF SYRACUSE and Syracuse Urban Renewal Agency, *Defendants*.

SIDNEY BLUMAN, Individually and as Executor of the Last Will and Testament of Israel Hurwitz, Deceased, *Plaintiff* v. CITY OF SYRACUSE and Syracuse Urban Renewal Agency, *Defendants*.

Supreme Court, Onondaga County

March 27, 1974

WILLIAM R. ROY, *Justice*.

The defendants in each of the above entitled actions have moved, pursuant to C.P.L.R. 3211 to dismiss the complaints on the ground that they fail to state a cause of action. Since both cases involve common questions of law and fact, this Court will consider them together.

In considering these motions to dismiss, the Court will apply the rules of liberal construction of the pleadings; Walkovsky v. Carlton, 18 N.Y.2d 414, 276 N.Y.S.2d 585, 223 N.E.2d 6; C.P.L.R. 3026; the acceptance as true of the material allegations of fact contained in the complaints and the truth of any reasonable inferences that may be drawn therefrom; Garvin v. Garvin, 306 N.Y. 118, 116 N.E. 2d 73; and that if any cause of action can be spelled out from the facts alleged, the motion must be denied, Dulberg v. Mock, 1 N.Y.2d 54, 150 N.Y.S.2d 180, 133 N.E.2d 695.

The facts giving rise to the instant litigation are without dispute. The plaintiffs in each action claim to be owners or parties in interest to real property situated within a 101 block area within the City of Syracuse and known as the

Syracuse Hill Neighborhood Development Program. This is a designated urban renewal area and contains over 1,600 individual parcels of land.

Defendant, City of Syracuse, is the governing body and the Syracuse Urban Renewal Agency is the department delegated by the City to carry out the functions vested in the Agency which was established pursuant to Article 15A of the General Municipal Law of the State of New York.

A brief review of the history of the Syracuse Hill Neighborhood Development Program will be helpful in the determination of these motions.

Beginning in 1962 comprehensive urban renewal plans were commenced in the form of a general neighborhood renewal plan in the area in question.

In April of 1964 the Common Council of the City of Syracuse approved an ordinance authorizing City sponsorship of an application to the Federal Government for a planning grant in connection with the above urban renewal project and thereafter received such grant for the study. The properties owned by the plaintiffs in both of the above entitled actions were within the planning grant area.

On September 12, 1966, the Common Council of the City of Syracuse approved an initial partial acquisition for purposes of the plan.

On October 14, 1966, the City submitted a plan of acquisition for another part of the renewal area, which plan included the property of the plaintiffs, Bluman, in the second action. It is conceded that at no time was the property of the plaintiffs in the first action ever included within the plan.

In June 10, 1969, the Common Council of the City of Syracuse changed the project from General Neighborhood

Renewal Plan to Neighborhood Development Plan and this was approved by the Common Council of the City on June 22, 1969. It is undisputed that for more than ten years the above events and activities associated therewith were the subject of wide and frequent publicity in the news media in the City of Syracuse and were the subject of frequent correspondence and conferences between the parties in both of the above captioned actions.

In implementing the foregoing plans and authorizations the defendants have acquired title to many parcels located within the urban renewal area and to several parcels in each of the blocks located within the City, in which the plaintiffs' properties are located. Many buildings have been demolished in furtherance of the plan and others have been boarded up.

The plaintiffs, feeling aggrieved as a result of the action of the City and the Agency, commenced these actions by a summons and complaint dated October 5, 1973.

In each of the complaints the history of ownership of the property is alleged and the activities of the City and the Agency as set forth above were outlined.

The complaints in each action contain similar allegations with respect to the activities of the City. Both of the complaints contain the following paragraphs:

> "As a result of the inordinately long and dilatory tactics of the defendants, the vicinity of the plaintiff's property has suffered a condemnation blight which has transformed the area into one which is highly undesirable for either residential or commercial purposes. The area has become a high-crime area, vandalism is rampant, and it is not safe to live or work there. Both

> residential and commercial tenants have moved from the area, the plaintiff has lost substantial amounts of rental income, he has been placed in a special insurance pool which has forced him to pay excessive premiums, he has been compelled to expend monies to protect the property from vandalism, and his property has been drastically reduced in value."
>
> "By reason of the foregoing the plaintiff has been deprived of due process of law and of the equal protection of the laws, in violation of the Fourteenth Amendment of the United States Constitution and of Article I, Sections 6 and 11 of the New York State Constitution."

In the Bluman complaint there is an allegation that the property was designated for acquisition but that no proceedings were commenced to condemn the property, nor was any step taken to compensate the Blumans for the damage allegedly sustained by them.

The Fisher complaint contains an allegation to the effect that although their property was in the urban renewal area, no proceedings have been commenced to condemn the property nor has anything been done to compensate plaintiffs in that action for the damage allegedly suffered by them.

Thus, the only difference between the two actions is that in the Bluman case the property was designated for condemnation, but has not as yet been taken and in the Fisher case the property was not designated for condemnation.

It is the plaintiffs' contention, in both actions, and, as appears by the complaints, that as a result of the actions of the defendants, the vicinity of the plaintiffs' property

has suffered a "condemnation blight". This, they allege, has transformed the area into one which is highly undesirable for either residential or commercial purposes; it has become a high crime rate area where vandalism is rampant and where it is not safe to live or work. Plaintiffs further allege that tenants have moved from the area, resulting in loss of rental income. Further, plaintiffs claim that they have been forced to pay excessive insurance premiums and that they have been compelled to expend monies for the protection of their property from vandalism and that the properties have been reduced in value.

The plaintiffs contend that they should be compensated, because of the so-called condemnation blight, for loss of income from the properties, depreciation in value, and additional costs incurred in protecting the property from vandalism, as well as increased insurance premiums. They contend that the actions of the defendants amount to a constitutional deprivation of due process and equal protection of the laws pursuant to the Fifth and Fourteenth Amendments of the United States Constitution.

It is important to point out that in both of these actions the plaintiffs are not claiming that the defendants have *taken* their property, either by *de jure* or *de facto* (inverse) condemnation. Nor do they seek to compel the defendant to condemn the properties. As this Court reads the complaints, the plaintiffs claim that they should be compensated for damages sustained by them as a result of the activities of the defendants in creating what is referred to as a "condemnation blight" in the vicinity of their properties.

In order to understand and properly evaluate the complaints of the plaintiffs, it is necessary to examine the law in connection with condemnation and appropriation. As

was stated in City of Buffalo v. J. W. Clement Co., 28 N.Y.2d 241 at pg. 255, 321 N.Y.S.2d 345 at pg. 357, 269 N.E.2d 895 at pg. 903, ". . . 'condemnation blight' relates to the impact of certain acts upon the value of the subject property. It in no way imports a *taking* in the constitutional sense, but merely permits of a more realistic valuation of the condemned property in the subsequent *de jure* proceeding." It thus can be seen that condemnation blight is not a cause of action, but in reality is a rule of evidence of valuation of real property that has been the subject of a taking in condemnation, *de jure* or *de facto*.

The Fifth Amendment to the U.S. Constitution provides, as pertinent to this decision, ". . . nor shall private property be taken for public use without just compensation."

The Fourteenth Amendment, so far as is pertinent to this decision provides, ". . . nor shall any State deprive any person of life, liberty or property, without due process; . . .". Article 1, § 6 of the New York State Constitution provides, as far as is pertinent to this decision, as follows: ". . . no person shall be deprived of life, liberty or property without due process of law."

It is in light of these provisions of the Federal and State Constitutions and upon the case law that we must determine whether the actions of the defendants, although concededly not constituting a "taking" of property in its accepted legal sense, i.e., *de facto* or *de jure* appropriation, give rise to a cause of action for diminution in property values and increase in costs of maintenance and protection of those properties.

The Fifth Amendment provides the basis for compensation for property taken for public use. This provision refers only to direct appropriations. Laycock v. Kenney,

9 Cir., 270 F.2d 580, cert. den. 361 U.S. 933, 80 S.Ct. 373, 4 L.Ed.2d 355 (1960), and was never supposed to have any bearing upon or inhibit laws that indirectly work harm and loss to individuals. Knox v. Lee, 79 U.S. 457, 20 L.Ed. 287 (1870).

Furthermore, as was stated in Danforth v. United States, 308 U.S. 271 at pg. 285, 60 S.Ct. 231 at pg. 236, L.Ed. 240 (1939), ". . . a reduction or increase in the value of property may occur by reason of legislation for or the beginning or a project. Such changes in value are incidents of ownership. They cannot be considered as a 'taking' in the constitutional sense."

It thus can be seen that under the Federal law the actions of the defendants do not amount to a "taking". Inasmuch as these acts do not amount to a "taking", under the Federal law, then there can be no deprivation of constitutional due process. Danforth v. United States, *supra*.

In the landmark New York case of City of Buffalo v. Clement Co., *supra*. 28 N.Y.2d at pg. 257, 321 N.Y.S. at pg. 359, 269 N.E.2d at pg. 904, Judge Scileppi, after a review of authorities, stated the policy of the State of New York is:

> ". . . to deny recovery in the absence of a substantial impairment of claimant's right to use or enjoy the property at any time prior to the date of final appropriation. Accordingly, the mere announcement of impending condemnations, coupled as it may well be with substantial delay and damage, does not, in the absence of other acts which may be translated into an exercise of dominion and control by the condemning authority, constitute a taking so as to warrant awarding compensation."

In addition, the Court of Appeals of the State of New York has previously stated: "But acts done in the proper exercise of governmental powers, and not directly encroaching upon private property, though their consequences may impair its use, are universally held not to be a taking within the meaning of the constitutional provision. They do not entitle the owner of such property to compensation . . . or give him any right of action." Sauer v. City of New York, 180 N.Y. 27, 32-33, 72 N.E. 579, 580, aff'd 206 U.S. 536, 27 S.Ct. 686, 51 L.Ed. 1176.

Assuming the allegations of the complaints to be true, there is no question that the plaintiffs in each of the above entitled actions have suffered damages. It may very well be that the damages that the plaintiffs would be able to prove might far exceed the fair market value of the properties to which the owners might be entitled in condemnation proceedings. However, the mere fact that someone has suffered damage does not give rise to a cause of action, unless the cause of action has a legal basis. The items of damages alleged by the plaintiffs were not actually taken by the defendants. They are not "property" within the contemplation of the eminent domain clauses of the Federal or State Constitutions.

This Court is unable to find any case, Federal or State, which supports the theory upon which plaintiffs base their cause of action.

Plaintiffs, in their brief, cite the case of Luber v. Milwaukee County, 47 Wis.2d 271, 177 N.W.2d 380 (1970), in support of their position. That case involved the interpretation of a Statute which purported to limit the amount of rental loss which might be recovered in a condemnation case. The Court held in that case that the Statute was un-

constitutional insofar as it limited compensation for rental loss, stating that ". . . one's interest in rental loss is such as is required to be compensated under the 'just compensation' clause of Article 1, sec. 13, Wis.Const. sec. 32.19(4), Stats. . . .".

What the Court was determining in that case was that once you have determined what is "just compensation", any attempt to limit that "just compensation" would be unconstitutional.

The other cases cited by the plaintiffs in their brief involve instances of either *de jure* or *de facto* appropriation and did not involve the precise question here presented for determination by this Court. The case of Levine v. City of New Haven, 30 Conn.Sup. 13, 294 A.2d 644 (1972), cited by the defendant, involved a complaint which the Court determined to be one for inverse condemnation (a *de facto* taking). The case thus involved the question of whether the acts of the City of New Haven constituted a "taking" in the constitutional sense. That case differs from the above captioned cases in that there is no claim by either plaintiff that the acts of the defendants constitute a "taking".

It might be pointed out that once it has been determined that a "taking" has occurred, then all of the rights of the plaintiffs to constitutional due process must be observed. This necessarily involves notice to the property owner and an opportunity for him to be heard on the question of "just compensation".

Prior to a determination that property has been taken within the constitutional sense, that is by a direct appropriation, Laycock v. Kenney, *supra,* be it *de jure* or *de facto,* there is no constitutional deprivation of due process.

Danforth v. United States, *supra;* City of Buffalo v. Clement Co., *supra.*

Although the Court is sympathetic to the plight of the plaintiffs in these cases, it finds no constitutional or case authority in support of the causes of action alleged in the complaints. As harsh as it may be, the principle of *damnum absque injuria* prevails, and the complaints in each of the above entitled actions are, accordingly, dismissed on the ground that they fail to state a cause of action.

Order of Court of Appeals of State of New York denying leave to appeal

STATE OF NEW YORK
COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the nineteenth day of March A.D. 1975.

Present,

HON. CHARLES D. BREITEL,

Chief Judge, presiding.

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4 Mo. No. 64

DONALD M. FISHER & ANO., as Trustees &c. of Bernard Fisher, deceased, &ors.,

Appellants,

—v.—

CITY OF SYRACUSE, &ORS.,

Respondents.

& ano. action—

BLUMAN v. CITY OF SYRACUSE.

A motion for leave to appeal to the Court of Appeals in the above causes having been heretofore made upon the part of the appellants herein and papers having been duly submitted thereon and due deliberation thereupon had:

Order of Court of Appeals of State of New York denying leave to appeal

ORDERED, that the said motion be and the same hereby is denied with twenty dollars costs and necessary reproduction disbursements.

JOSEPH W. BELLACOSA
Clerk

Judgment of Supreme Court, Onondaga County, upon remittitur from Court of Appeals (both actions)

STATE OF NEW YORK
SUPREME COURT

COUNTY OF ONONDAGA

Index No. 74-2090

SIDNEY BLUMAN, Individually and as Executor of the last Will and Testament of Israel Hurwitz, deceased,

Plaintiff,

—v.—

CITY OF SYRACUSE and SYRACUSE URBAN RENEWAL AGENCY,

Defendants.

DONALD M. FISHER & ano., as Trustees of Bernard Fisher, et al.,

Plaintiffs,

—v.—

CITY OF SYRACUSE and SYRACUSE URBAN RENEWAL AGENCY,

Defendants.

The above named appellants, Sidney Bluman, Donald M. Fisher, et al, moved for leave to Appeal to the Court of Appeals, said motion returnable January 27, 1975, from an Order of the Appellate Division of this Court, Fourth Judicial Department, affirming the judgment entered on

Judgment of Supreme Court, Onondaga County, upon remittitur from Court of Appeals (both actions)

the 24th day of May, 1974, in the office of the Clerk of the County of Onongada, said judgment dismissed the appellant's complaint and the Court of Appeals having denied said motion for leave to appeal by order dated March 19, 1975, a copy of which is attached hereto, said order granting respondents, City of Syracuse and Syracuse Urban Renewal Agency costs of twenty dollars ($20.00) and necessary reproduction disbursements ($131.20),

Now, on motion of Thomas J. Lowery, Jr., Special Counsel for the City of Syracuse, it is

ORDERED, ADJUDGED AND DECREED that pursuant to the aforementioned Order of the Court of Appeals, that the respondents, City of Syracuse and Syracuse Urban Renewal Agency, recover of appellants, Sidney Bluman, individually and as Executor of the last Will and Testament of Israel Hurwitz, Donald M. Fisher, et al., the sum of twenty dollars ($20.00) costs together with necessary reproduction costs in the sum of $131.20, amounting in all to $151.20 and that respondents have execution therefor.

Judgment signed this 31th day of March, 1975.

s/ JAMES D. GORHAM
Clerk

s/ HELDA H. YOUNG
Deputy Co. Clerk

Complaint—Fisher Case

SUPREME COURT
OF THE STATE OF NEW YORK

COUNTY OF ONONDAGA

DONALD M. FISHER and MELVIN P. FISHER, as Trustees under the Last Will and Testament of BERNARD FISHER, deceased, ROSLYN MILLER, BERNICE GOLD and PHILIP ADLER,

Plaintiffs,

—against—

CITY OF SYRACUSE and SYRACUSE URBAN RENEWAL AGENCY,

Defendants.

The Plaintiffs, complaining of the Defendants, by Raphael, Searles, Vischi & Sackman, their attorneys, allege as follows:

1. The plaintiffs, Donald M. Fisher and Melvin P. Fisher, as Trustees under the Last Will and Testament of Bernard Fisher, deceased, are the owners in fee of an undivided five-eighths interest in the real property hereinafter described and the plaintiffs, Roslyn Miller, Bernice Gold and Philip Adler, are the owners, each of an undivided one-eighth interest in the real property hereinafter described.

2. The defendant, City of Syracuse, is a municipal corporation of the State of New York and the defendant, Syracuse Urban Renewal Agency, is a body corporate and politic.

3. The plaintiffs are the owners in fee simple absolute of two tracts of land described as follows:

Tract I. All that track or parcel of land situate in the City of Syracuse, County of Onondaga and State of New York, and known and designated as being all that part of Lots Numbers Thirty-five (35) and Thirty-six (36) in Block Number Two hundred ten (210) in said City and bounded and described as follows, viz.: Beginning at the southwest corner of said block, and running from thence north along the east line of Crouse Avenue sixthy-nine (69) feet; thence east parallel with the south line of said Block fifty-seven and three quarters (57¾) feet; thence south, parallel with the first course sixty-nine (69) feet to the north line of E. Fayette Street, and thence, west along the north line of East Fayette Street, Fifty-seven and three-quarters (57¾) feet to the place of beginning.

Tract II. All that tract and parcel of land located in the 15th Ward of the City of Syracuse being Lot P. 35 Blk. 210 at 217, 221-227 So. Crouse Ave., approx. 63 x 132 and L. 3 x 14.25 ft. in dimension, vacant; and being Book 1 Plate 105 Parcel 109 of the official tax map of the City of Syracuse. Said parcel now being designated as approx. 63 x 132 and L. 2 x 74.25 ft. in dimension on the tax maps of the City of Syracuse. Said premises being more particularly described as: All that tract or parcel of land, situate in the City of Syracuse, County of Onondaga and State of New York, conveys all that piece or parcel of land known as Lot No. 35 of Blk. 210 of the former Village of Lodi, according to a map made by Calvin Guiteau in the year 1833 for Teall, Burt & Baldwin, and on file in the Clerk's office of Onondaga County. Reserving from

said above lot 35 a strip of land on the south side of said lot as contained in a deed given by Jesse B. Gaylord and Anna O. Gaylord to Walter E. Banning, dated Dec. 16, 1871, recorded Dec. 23, 1871 Book 190 at page 289&c.

Excepting therefrom all that tract or parcel of land situate in the City of Syracuse, County of Onondaga, State of New York and being part of Lot No. 35, Block No. 210, and being more particularly described as follows: Beginning at a point in the easterly line of South Crouse Avenue, said point being 132 feet northerly of the northerly line of East Fayette Street as measured along said line of South Crouse Avenue, said point of beginning also being the northwest corner of said lot No. 35. Thence easterly along the northerly line of said Lot No. 35 and parallel to East Fayette Street a distance of 132 feet to the northeast corner of said lot. Thence southerly along the easterly line of said Lot No. 35 a distance of 66 feet to the southeast corner of said lot. Thence westerly along the southerly line of said lot a distance of 56.25 feet to a point. Thence northerly parallel to said line of South Crouse Avenue a distance of 56 feet to a point. Thence westerly parallel to said East Fayette Street and the northerly line of said Lot No. 35, a distance of 75.75 feet to a point in said line of South Crouse Avenue; thence northerly along said line of South Crouse Avenue, a distance of 10 feet to the place of beginning.

4. Title in fee to the above described property was acquired by the plaintiffs and/or their predecessors through the following deeds: As to Tract I, by deed from

Rahkin Holding Company and Rahkin Holding Corporation to Aaron Adler and Bernard Fisher, dated January 14, 1946, and recorded in the office of the County Clerk of Onondaga County on January 15, 1946 in Liber 1185 of Deeds, at page 256; as to Tract II, by deed from City of Syracuse to Aaron Adler and Bernard Fisher, dated April 6, 1954, and recorded in the office of the County Clerk of Onondaga County on June 4, 1954 in Liber 1968 of Deeds, at page 581; as to both tracts, by deed and assignment of claim from Irving Adler to Donald M. Fisher and Melvin P. Fisher, as Trustees under the Last Will and Testament of Bernard Fisher, deceased, dated October 1, 1973, and recorded in the office of the County Clerk of Onondaga County on October 10, 1973 in Liber 2514 of Deeds, at page 996.

5. Aaron Adler, the owner, as tenant in common, of an undivided half-interest in the above described property, died testate on January 5, 1962, his Will was probated in the Surrogate's Court of Onondaga County on January 23, 1962, and under his Will, upon the death of his widow, Lottie Adler, on March 23, 1971, title to the above-described property devolved upon his children, Roslyn Miller, Bernice Gold, Philip Adler and Irving Adler.

6. Bernard Fisher, the owner, as Tenant in common, of the other undivided half-interest in the above described property, died testate on January 12, 1969, his Will was probated in the Surrogate's Court of Onondaga County on February 10, 1969, and Letters of Trusteeship were issued in his estate to Donald M. Fisher and Melvin P. Fisher on June 23, 1969.

7. Beginning in 1962 plans, affecting the area in which the above described property is located, were commenced

for a comprehensive urban renewal in the form of a General Neighborhood Renewal Plan. In April of 1964 the Common Council of the City of Syracuse approved an ordinance authorizing City sponsorship of an application to the Federal Government for a planning grant and thereafter received a grant. On September 12, 1966 the Common Council approved an initial partial acquisition for the purposes of the plan. On October 14, 1966 the City of Syracuse submitted a plan of acquisition of another part of the renewal area, which plan included plaintiff's above described property. On June 10, 1969 the Common Council of the City of Syracuse changed the project from General Neighborhood Renewal Plan to Neighborhood Development Plan and on June 22, 1969 the Common Council approved the project. For more than ten years the above mentioned events and activities associated with such events were the subject of wide and frequent publicity in the newspapers in the City of Syracuse and the subject of correspondence and conferences between the parties to this action.

8. Pursuant to the foregoing plans and authorizations the defendants have acquired title to many parcels in the area and to several parcels in the very block in which the plaintiffs' above described property is located. Many buildings have been demolished and others have been boarded up.

9. As a result of the inordinately long and dilatory tactics of the defendants, the vicinity of the plaintiffs' property has suffered a condemnation blight which has transformed the area into one which is highly undesirable for either residential or commercial purposes. The area has become a high-crime area, vandalism is rampant, and it is not safe to live or work there. Both residential and

commercial tenants have moved from the area, the plaintiffs have lost substantial amounts of rental income, they have been placed in special insurance pool which forced them to pay excessive premiums, they have been compelled to expend monies to protect the property from vandalism, and their property has been drastically reduced in value.

10. Although the above described property is in the renewal area, no proceedings have been commenced to condemn the said property nor has any step been taken to compensate the plaintiffs for the damage which they have suffered as a result of the foregoing action of the defendants.

11. By reason of the foregoing the plaintiffs have been deprived of due process of law and of the equal protection of the laws, in violation of the Fourteenth Amendment of the United States Constitution and of Article I, Sections 6 and 11 of the New York State Constitution.

WHEREFORE plaintiffs demand judgment against the defendants for the damages sustained by them as a result of the matters alleged herein in the sum of Three Hundred Fifty Thousand Dollars ($350,000.00), together with the costs and disbursements of this action.

RAPHAEL, SEARLES, VISCHI & SACKMAN
Attorneys For Plaintiffs
150 State Street
Albany, New York 12207
Tel. 518-465-0800

Complaint—Bluman Case

SUPREME COURT
OF THE STATE OF NEW YORK

COUNTY OF ONONDAGA

SIDNEY BLUMAN, individually and as Executor of the Last Will and Testament of ISRAEL HURWITZ, deceased,

Plaintiff,

—against—

CITY OF SYRACUSE and SYRACUSE URBAN RENEWAL AGENCY,

Defendants.

The Plaintiff, complaining of the Defendants, by Raphael, Searles, Vischi & Sackman, his attorneys, alleges as follows:

1. The plaintiff, Sidney Bluman, as an individual, is the owner in fee of an undivided one-half interest in the real property hereinafter described and the plaintiff, Sidney Bluman, as Executor of the Last Will and Testament of Israel Hurwitz, deceased, has a power of sale under the said will as to the other one-half interest in the real property hereinafter described.

2. The defendant, City of Syracuse, is a municipal corporation of the State of New York and the defendant, Syracuse Urban Renewal Agency, is a body corporate and politic.

3. The plaintiff is the owner in fee simple absolute and/or has the power of disposition of such fee of two tracts of land described as follows:

Tract I. All that piece or parcel of land situate in the City of Syracuse, County of Onondaga, and State of New York, known and distinguished as being part of Lot Number 86 of Block Number 211 of said City and bounded and described as follows, viz: Beginning at a point on the northerly line of East Fayette Street, 66 feet easterly from the southwesterly corner of said block; running thence easterly along the south line of said block 39.33 feet; thence northerly a distance of 131.34 feet to the north line of said Lot at a point 38.72 feet from the northwest corner of said lot; thence westerly along the north line of said lot 38.72 feet to the northwest corner thereof; thence southerly along the west line of said lot to the place of beginning; being the premises commonly known as 1105 East Fayette Street in said City.

Tract II. All that piece or parcel of land situate in the City of Syracuse, County of Onondaga, and State of New York, known and distinguished as the westerly one-half of Lot No. 88 in Block No. 211 of said City; said parcel being on the north side of East Fayette Street and being 33 feet front and rear and extending back by parallel lines about 132 feet; and being the premises commonly known as 1113 East Fayette Street in said City.

4. Title in fee to the above described property was acquired by the plaintiff and/or his predecessor through the following deeds: As to Tract I, by deed from James V.

Henry, Sr., to Sidney Bluman and Israel Hurwitz, dated February 22, 1963, and recorded in the office of the County Clerk of Onondaga County on February 26, 1963, in Liber 2133 of Deeds, at page 112; as to Tract II, by deed from Eugene Frank Fullerton to Sidney Bluman and Israel Hurwitz, dated May 11, 1963, and recorded in the office of the County Clerk of Onondaga County on May 14, 1963, in Liber 2143 of Deeds, at page 536.

5. Israel Hurwitz, the owner, as Tenant in common, of an undivided half-interest in the above described property, died testate on November 2, 1971, his Will was probated in the Surrogate's Court of Onondaga County on January 14, 1972, and Letters Testamentary were issued in his estate to Sidney Bluman on January 14, 1972. Under said Will the Executor has a full, complete, and unqualified power of sale.

6. Beginning in 1962, plans affecting the area in which the above described property is located, were commenced for a comprehensive urban renewal in the form of a General Neighborhood Renewal Plan. In April of 1964 the Common Council of the City of Syracuse approved an ordinance authorizing City sponsorship of an application to the Federal Government for a planning grant and thereafter received a grant. On September 12, 1966 the Common Council approved an initial partial acquisition for the purposes of the plan. On October 14, 1966 the City of Syracuse submitted a plan of acquisition of another part of the renewal area, which plan included plaintiff's above described property. On June 10, 1969 the Common Council of the City of Syracuse changed the project from General Neighborhood Renewal Plan to Neighborhood Development Plan,

and on June 22, 1969 the Common Council approved the project. For more than ten years the above-mentioned events and activities associated with such events were the subject of wide and frequent publicity in the newspapers in the City of Syracuse and the subject of correspondence and conferences between the parties to this action.

7. Pursuant to the foregoing plans and authorizations the defendants have acquired title to many parcels in the area and to several parcels in the very block in which the plaintiff's above described property is located. Many buildings have been demolished and others have been boarded up.

8. As a result of the inordinately long and dilatory tactics of the defendants, the vicinity of the plaintiff's property has suffered a condemnation blight which has transformed the area into one which is highly undesirable for either residential or commercial purposes. The area has become a high-crime area, vandalism is rampant, and it is not safe to live or work there. Both residential and commercial tenants have moved from the area, the plaintiff has lost substantial amounts of rental income, he has been placed in a special insurance pool which has forced him to pay excessive premiums, he has been compelled to expend monies to protect the property from vandalism, and his property has been drastically reduced in value.

9. Although plaintiff's property throughout the foregoing periods has been designated for acquisition, no proceedings have been commenced to condemn the said property nor has any step been taken to compensate the plaintiff for the damage which he has suffered as a result of the foregoing action of the defendants.

10. By reason of the foregoing the plaintiff has been deprived of due process of law and of the equal protection of the laws, in violation of the Fourteenth Amendment of the United States Constitution and of Article I, Sections 6 and 11 of the New York State Constitution.

WHEREFORE, plaintiff demands judgment against the defendants for the damages sustained by him individually and as Executor of Last Will and Testament of Israel Hurwitz, deceased, as a result of the matters alleged herein in the sum of Two Hundred Thousand Dollars ($200,000.00), together with the costs and disbursements of this action.

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Supreme Court, U. S.
FILED
JUN 30 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1506

DONALD M. FISHER and MELVIN P. FISHER, as Trustees under the Last Will and Testament of BERNARD FISHER, deceased, ROSLYN MILLER, BERNICE GOLD and PHILIP ADLER,

Petitioners,

—*v.*—

CITY OF SYRACUSE and SYRACUSE URBAN RENEWAL AGENCY,

Respondents.

SIDNEY BLUMAN, individually and as Executor of the Last Will and Testament of ISRAEL HURWITZ, deceased,

Petitioner,

—*v.*—

CITY OF SYRACUSE and SYRACUSE URBAN RENEWAL AGENCY,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, FOURTH DEPARTMENT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No.

DONALD M. FISHER and MELVIN P. FISHER, as Trustees under the Last Will and Testament of BERNARD FISHER, deceased, ROSLYN MILLER, BERNICE GOLD and PHILIP ADLER,

Petitioners,

—*v.*—

CITY OF SYRACUSE and SYRACUSE URBAN RENEWAL AGENCY,

Respondents.

SIDNEY BLUMAN, individually and as Executor of the Last Will and Testament of ISRAEL HURWITZ, deceased,

Petitioner.

—*v.*—

CITY OF SYRACUSE and SYRACUSE URBAN RENEWAL AGENCY,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, FOURTH DEPARTMENT

STATEMENT

This appeal consolidates two actions brought by property owners against the City of Syracuse and The Syracuse Urban Renewal Agency for damages. In both actions, a motion to dismiss was brought pursuant to CPLR Section 3211. The

Supreme Court, Onondaga County, having found the cases to present common questions of law and fact, considered the motions together. This Court rendered a decision dismissing both complaints. Judgments of dismissal were entered on May 24, 1974, in the Office of the County Clerk of Onondaga County pursuant to an Order of the Supreme Court, Onondaga County (Roy, J.) dated and entered May 15, 1974. This case is reported in 78 Misc.2d 124, 355 N.Y.S.2d 239. Notices of appeal were filed in both actions on June 3, 1974, in the Office of the County Clerk of Onondaga County. The opinion of the Appellate Division, dated December 12, 1974, affirming the lower court decision is reported in 46 A.D.2d 216, 361 N.Y.S.2d 773. The Court of Appeals of the State of New York denied Petitioners' motion for leave to appeal by an order dated March 19, 1975.

FACTS

Plaintiffs-Petitioners are parties in interest to real property situated within the Syracuse Neighborhood Development Program. This Urban Renewal area encompasses 101 blocks within the City of Syracuse and contains over 1600 individual parcels of land. The Respondent, City of Syracuse, is the governing body and the Syracuse Urban Renewal Agency is the department designated to carry out the functions of Urban Renewal established pursuant to Article 15(a) of the General Municipal Law of the State of New York.

Petitioners have commenced an action against the Defendants-Respondents for damages based on a constitutional claim. They allege that as a result of Urban Renewal activities carried out by the Respondents pursuant to Section 503 and 503(a) of the General Municipal Law of the State of New York, the area surrounding Petitioners' property has suffered a condemnation blight. They further allege that the effect of such a blight has caused Petitioners to lose rental income; incur excessive expense for insurance premiums; incur expense in protection of property from vandalism; and a reduction in property value.

In their complaints, Petitioners allege the following acts on the part of Respondents. In 1962 the preliminary proposal for an urban renewal project, which would affect the area where the subject property is located, was commenced. In April 1964 the Syracuse Common Council approved the sponsorship and application for federal funding. In October 1966 the Common Council approved a partial acquisition for the purposes of implementing the plan in the area where the subject properties were located. Petitioners further allege that during this period the activities of the Urban Renewal Agency were the subject of frequent publicity in the newspapers in Syracuse and the subject of correspondence and conferences between the parties to this action. Pursuant to the plan, the Respondents have acquired a number of parcels in the area.

The Petitioners have based their claim on a novel constitutional argument. They contend that the foregoing activities of the municipality, authorized by law pursuant to a public purpose, violate the due process and equal protection clauses of both New York State and the United States Constitution.

It is extremely important to note that the Petitioners emphasize there has been no taking of their property, either through *de jure* or a *de facto* (inverse) condemnation. Nor do the Petitioners seek to compel the Respondents to institute proceedings for the condemnation of their property. (Page 5 Petitioners' Brief). They do not attack the enabling statutes, §503 and 503(a) of the General Municipal Law.

QUESTIONS PRESENTED

Does a cause of action exist for damages sustained to property located within an Urban Renewal plan as a result of the activities of a municipality through its agency as alleged in Plaintiff-Petitioners' complaints, absent either a *de jure* or *de facto* (inverse) condemnation?

POINT I

THE PETITIONERS' COMPLAINTS DO NOT ALLEGE A CAUSE OF ACTION FOR DEPRIVATION OF DUE PROCESS AND EQUAL PROTECTION PURSUANT TO THE FIFTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION.

The Petitioners contend that the actions of the Respondents in implementing the Urban Renewal plan amount to a deprivation of due process and equal protection pursuant to the Fifth and Fourteenth Amendments of the United States Constitution.

The Fifth Amendment provides, ". . .nor shall private property be taken for public use, without just compensation". The Fourteenth Amendment, which makes the Fifth Amendment applicable to the States provides, ". . .nor shall any state deprive any person of life, liberty or property without due process."

The inherent sovereign right of eminent domain is well recognized. *People* v. *Priest*, 206 N.Y. 274, *People* v. *Adirondack R. Co.*, 160 N.Y. 225, Affd. 176 U.S. 335. This right is limited by the Mandates of the Constitution. In the U.S. Constitution, the Fifth Amendment provides the basis for compensation to a landowner for the taking of property for public use. But the rights afforded by the Fifth Amendment may only be invoked where there is a direct appropriation. *Laycock* v. *Kenney*, 270 F.2d 580 cert. den. 361 U.S. 933 (1960). This principle was first established in *Knox* v. *Lee*, 79 U.S. 457 where the Supreme Court stated that the Fifth Amendment was "never . . . supposed to have any bearing upon or inhibit laws that indirectly work harm or loss to individuals." 79 U.S. at 551. In the case at bar Petitioners seek to extend the due process clause of the Fifth Amendment to include recovery where there *has admittedly been no taking*. (P. 5 Petitioners' Brief).

Faced with similar situations, other claimants have argued that a reduction in value does in fact amount to a taking so as to require the application of Fifth Amendment rights. These

arguments have long been rejected on the authority of *Danforth* v. *U.S.*, 308 U.S. 271 where the Court held;

> A reduction or increase in the value of property may occur by reason of legislation for the beginning or completion of a project. Such changes in value are incidents of ownership. They cannot be considered as a 'taking' in the constitutional sense (308 U.S. at p. 285).

Recent Federal Court decisions have rejected claims where the intrusions have been similar to those of Petitioners. In *Woodland Market Realty Co.* v. *City of Cleveland*, 426 F.2d 955 (6th Cir. 1970) a property owner brought an action against a municipality for losses alleged to have been sustained in connection with the establishment of an Urban Renewal project which transformed the surrounding residential area into vacant and undeveloped land. The property owner alleged the value of its leasehold interest had been destroyed by activities of the municipality in establishing an Urban Renewal project. The District Court granted a motion to dismiss and the Court of Appeals affirmed. The Court held "that there had been no *taking* . . . within the meaning of the Fifth or Fourteenth Amendments requiring payment of just compensation." The Court further stated:

> The losses occasioned to the plaintiff were not the result of any intrusion or encroachment by the City upon the plaintiff's property . . . Action done in the proper exercise of governmental powers which do not directly encroach upon private property, though they may impair its use or value do not amount to a taking of such property within the meaning of the constitutional provisions that private property shall not be taken for public use without just compensation. (citations omitted)

The Court went on to say;

> When reduced to its essence, the issue presented upon this appeal is whether a property owner, having property adjacent to an urban renewal project, may maintain an action for compensation under the Fifth and Fourteenth Amendments of the Federal Constitution for deprecation in the value of his property by reason of the establishment of the project. This Court is of the opinion that he cannot.

In *Trager* v. *Peabody Redevelopment Authority*, 367 F. Supp. 1000 (D.C. Mass. 1973) the court states

> . . . the mere determination by a governmental authority that a particular area of real estate is "blighted" as an initial step in an Urban Renewal project is not a constructive taking. This is so even though the determination of blight has an adverse effect on the value of the property. The initial steps in any condemnation proceeding, although such steps diminish the value of the property concerned, themselves do not require compensation (citing *Danforth* v. *U.S.*, *supra*, and *Woodland Market Realty Co.* v. *City of Cleveland*, *supra*, among other cases)

Whether or not a petitioner claims a taking, or in an attempt to avoid the *Danforth* rationale, simply alleges damages, as in the case at bar; the Federal law requires the municipal actions to amount to a "taking" before there can be a deprivation of constitutional due process. Clearly on the facts of this case and on the authority cited, the petitioners have failed to establish a claim for compensation based on their Fifth Amendment rights.

With reference to a claimed denial of equal protection, the law only permits compensation for properties that are taken. This concept applies whether the taking is de jure or de facto (inverse). This classification of who is entitled to compensation is based on the mandate of the Fifth Amendment and Article 1, Section 7 of the New York State Constitution where both require a taking. The requirements of equal protection are met if a classification or distinction among classes has some reasonable or rational basis. See, *Police Dept. of the City of Chicago* v. *Mosley*, 408 U.S. 92, 92 S.Ct. 2286 (1972); *U.S. Dept. of Agriculture* v. *Moreno*, 409 U.S. 1036, 93 S.Ct. 2821 (1973). For decisions on the state level see *Bauch* v. *City of New York*, 21 N.Y.2d 599, cert. den. 393 U.S. 834, *Bucho Holding Co.* v. *Temporary State Housing Rent. Comm.*, 11 N.Y.2d 469.

POINT II

THE PETITIONERS' COMPLAINTS DO NOT ALLEGE A CAUSE OF ACTION FOR DEPRIVATION OF DUE PROCESS AND EQUAL PROTECTION PURSUANT TO THE NEW YORK STATE CONSTITUTION.

Article 1, Section 6 of the New York State Constitution provides that "no person shall be deprived of life, liberty or property without due process of law". Again recognizing the sovereign's right of eminent domain, we find that Article 1, Section 7 sets the appropriate constitutional remedy for those property owners affected by the exercise of the state's power. It provides that "(P)rivate property shall not be *taken* for public use without just compensation". See e.g. *Fifth Ave. Coach Lines, Inc.* v. *City of New York*, 11 N.Y.2d 342 (1962).

New York has long been what is referred to as a "taking" jurisdiction. That is, a Court must find either a de jure or de facto taking before it can award damages to a property owner. *Foster* v. *Scott*, 136 N.Y. 577. This rule was most recently reaffirmed in the landmark decision handed down in *City of Buffalo* v. *J.W. Clement Co.*, 28 N.Y.2d 241, 321 N.Y.S.2d 345 (1971). In *Clement* the Court stated;

> [a] de facto taking has traditionally been limited to situations involving a direct invasion of the condemnee's property or a direct legal restraint on its use. (citation omitted at p. 253).

Petitioners have taken pains to point out the fact that they do not claim either a de facto or de jure taking in the instant cases. (P. 5 Petitioners' Brief). They recognize that condemnation blight is not equivalent to a de facto taking in this State (P. 9 Petitioners' Brief).

As Judge Roy recognized in his Opinion below, the *Clement* case is dispositive of the issue raised in this appeal, (A. 16a), because it re-affirms the New York Rule that:

> "the mere announcement of impending condemnations, coupled as it may well be with substantial delay and damage,

> does not, in the absence of other acts which may be translated into an exercise of dominion and control by the condemning authority, constitute a *taking* so as to warrant awarding compensation." *Clement, supra*, p. 257.

For the purposes of this case, the rule is clear that no action can be brought for compensation unless there are acts on the part of the municipality which constitute a direct invasion or a legal restraint (*Clement, supra*, at Page 253).

The facts upon which the Court of Appeals decided *Clement* are important if we are to analyze and understand its full impact. Clement, a fee owner of property located within an Urban Renewal project, was notified in 1954 of the possibility of impending condemnation of his property. In 1957 Clement was advised that his property could be taken between 1960 and 1962. Clement was one of the world's largest printing companies and had extensive machinery located at the acquisition site.

Early in 1963, Clement was advised via letter that acquisition was scheduled for May, 1963. Removal of all equipment was completed by April of that year, however, the actual condemnation proceeding did not commence until February, 1967 (311 N.Y.S.2d 113).

The trial Court found the acts of the City constituted a de facto taking as of April, 1963. That holding was affirmed by the Appellate Division (34 A.D.2d 24, 31-32, 311 N.Y.S.2d 98, 106). The Court of Appeals modified and held that there was no de facto taking in 1963, but permitted claimant to establish the fair value of his property taken in 1967 as if it had not suffered the ill effects of condemnation. The Court recognized the debilitating effects of condemnation blight but held it would only be relevant after a taking had occurred as envisioned by Article 1, Section 7 of the State Constitution.

> " . . . condemnation blight relates to the impact of certain acts upon the value of the subject property. It in no way imports a *taking* in the constitutional sense, but merely permits a realistic valuation of the condemned property in the subsequent de jure proceeding. *Clements*, supra at P. 255."

As Judge Roy stated in his opinion below:

> "It thus can be seen that condemnation blight is not a cause of action, but in reality is a rule of evidence of valuation of real property that has been the subject of a taking . . . (A 15a)."

There are many facts in the *Clement* case which were analogous to those alleged in the case at bar. Property values were drastically reduced, the area had fallen into disrepair, property was unrentable, but the owners still had to pay for taxes and insurance. The Court found this to be "condemnation blight" and was quick to point out the distinction between blight and a de facto taking. (*Clement* at p. 256).

It is this judicial recognition of the existence of condemnation blight which permits the use of *Clement* as authority in this case. The Court recognized the fact that oft times property owners fall into the situation that plaintiffs herein find themselves. But the Court held that only those activities which amounted to a de facto taking could give rise to a cause of action for damages. Condemnation blight was determined not to amount to a de facto taking and therefore would not support a distinct cause of action. The Court states the policy in this state is

> "to deny recovery in the absence of a substantial impairment of the claimant's right to use or enjoy the property . . ." *Clement*, supra, at p. 257).

In reaching its decision the Court cites *Danforth* v. *United States*, supra. The Court considered recent decisions in other states and examined public policy. The Court realized that public announcement of impending condemnation, while perhaps a leading factor in condemnation blight, far outweighs the resultant havoc if a policy of secrecy were followed (*Clements*, supra, at 256).

The holding in *Clement* demonstrates the Court's interpretation that the constitutional requirement for compensation reserves to the people the right to construct public improvements without paying the owners of private property for

incidental injury caused thereby. In *City Service Oil Co.* v. *City of New York*, 5 N.Y.2d 110 Judge Fuld speaking for a unanimous Court said:

> . . . Any loss resulting from the interference with an abutting owner's enjoyment of his property is *damnum absque injuria* and the owner must bear it . . . in this area of governmental action, what is best for the body politic in the long run must prevail over the interests of particular parties. See e.g., *Shepard* v. *Village of Skaneateles*, 300 N.Y. 115, 118, 89 N.E.2d 619, 620. The interference here complained of must be shouldered by the plaintiffs as one of the inconveniences to be borne by the individual for the large benefit of the community and the public in general.

It should be remembered that there were 1600 parcels located within this particular urban renewal project. Less than 25% were acquired. If all the remaining owners were permitted the relief sought by these plaintiffs, the urban renewal project would come to a halt. The Congress of the United Statess the State Legislature and the Syracuse Common Council all determined that the urban renewal program would be beneficial to the people of the City of Syracuse. Clearly this is the type of benefit to the community to which Judge Fuld was addressing himself.

POINT III

THE AUTHORITY CITED BY PETITIONERS DOES NOT SUPPORT THEIR POSITION.

Petitioners contend that the facts in *Levine* v. *City of New Haven*, 294 A.2d 644 (1972 Superior Ct. Conn.) are similar to those alleged in the present case; however, there are important differences which distinguish *Levine* from the case at bar. In *Levine*, the complaint alleged four grounds: (1) a taking without due process; (2) nuisance; (3) gross negligence; (4) interference with the right to sell property. The Court sustained the demurrer to the third count, but overruled the others. The Court found the first count to be founded on the theory of "inverse (de facto) condemnation. The Court admitted the thinness of plaintiffs'

second claim but was willing to afford him an opportunity to sustain it. The fourth claim was sustained because the Court found allegations of acts which would have interfered with the sale of a portion of the property. With the possible exception of the nuisance claim, the case would appear to be consistent with the New York Rule. In *Levine* the plaintiff claimed a de facto taking and direct interference with the right to sell the property. In the case at bar, plaintiffs do not make these allegations.

The Petitioners have extensively cited the case of *Luber* v. *Milwaukee County*, 177 N.W.2d 380 (Wisc. 1970) in support of their position. An examination of that case along with subsequent Wisconsin Supreme Court decisions will demonstrate that *Luber* does not support their positions.

In *Luber*, the *plaintiffs' property had been taken* by condemnation. Prior to the taking the Wisconsin Legislature had passed a statute allowing recovery for rent loss incurred in the year prior to the taking. The plaintiff argued that the limitation of one year was unconstitutional on the basis of the just compensation clause of the Wisconsin Constitution. The Supreme Court of Wisconsin agreed and held that the statute:

> "Insofar as it limits compensation for the taking of such interest is in conflict with the State Constitution . . . and sec. 32.19(4), stats, insofar as it limits compensation is invalid. *Luber*, 177 N.W.2d at 386."

The decision in *Luber* is predicated on the fact that a taking had been effected. Once property is taken then just compensation is required. In the present case, petitioners claim no taking. As such, even in Wisconsin they would not be entitled to damages. Subsequent to *Luber* the Wisconsin Supreme Court has reiterated its rule that a taking is a requisite to recovery. In *Weinandt* v. *City of Appelton*, 207 N.W.2d 673 (1973) the plaintiffs attempted to rely on *Luber* to support a claim for damages where there had been no taking. The Wisconsin Court stated:

> "In the Luber case, that portion of Sec. 32.19(4) limiting recovery of consequential damages for loss of rent in condemnation, was held unconstitutional because it conflicted with the just compensation requirements . . . There is no taking in this case, so the just compensation question is not present."

In *Surety Savings & Loan Assn.*, v. *State Dept. of Transportation*, 195 N.W.2d 464 (1972) the same Court stated:

> "Compensation would be required if a property right was so impaired as to amount to a taking of land . . . However, injury to property resulting from the exercise of the police power of the State does not necessitate compensation (citing *Luber* v. *Milwaukee County*, supra)."

See also *Schneider* v. *State*, 187 N.W.2d 172 (1971) for a similar analysis of *Luber* supra. It would appear that both Wisconsin and New York are "taking" jurisdictions in the final analysis.

Finally, Petitioners look to the case of *Klopping* v. *City of Whittier & Sarff* v. *City of Whittier*, 8 Cal 3d 39, 104 Cal Rptr 1, 500 P2d 1345 (1972) as support for their position.

As Petitioners recognized in their brief, the actions in *Klopping* were in inverse (de facto) condemnation. (P. 13 Petitioners' Brief). As such the case is clearly distinguishable from the instant case where no taking is alleged. The requisites for a taking and recovery in California are similar to those in New York. In a decision rendered after *Klopping*, the California Supreme Court when faced with a claim arising out of the exercise of eminent domain rights, said:

> "In order to state a cause of action for inverse condemnation, there must be an invasion or an appropriation of some valuable property right which the landowner possesses and the invasion or appropriation must directly and specifically affect the landowner to his injury. *Selby Realty Co.*, v. *City of San Buenaventura*, 10 Cal.3d 110, 109 Cal. Rptr. 799 514 P2d 111 (1973)."

From this restatement of the California Rule, it is clear that *Klopping* has not and was not intended to permit damages absent a taking.

Examination of the *Klopping* decision shows that the California Supreme Court was concerned with the same issue as was the Court of Appeals in *Clement*, namely the correct valuation of property once a taking has been effected.

The facts in *Klopping* are rather complex, but they must be analyzed to discern the import of the decision. Plaintiffs Klopping & Sarff owned properties which were designated for condemnation in May, 1965 and with the usual public announcements followed. In November, 1965, condemnation proceedings were commenced. In November, 1966, these proceedings were dismissed due to protracted litigation commenced by other property owners, however, the City announced its intention to resume condemnation proceedings if the suits could be settled. In July, 1967, both plaintiffs submitted claims for damages to the City. These claims were rejected and the actions appealed from were commenced. Subsequent to suit, both properties had been recondemned. Klopping's action proceeded to judgment and the Court held he should have claimed the damages in that suit and therefore dismissed his claim. Plaintiff, Sarff, filed his inverses condemnation suit in March, 1968 and in May of that year he lost his property through foreclosure and subsequently the formal condemnation proceeding was commenced. The issue before the Court was whether Sarff could maintain his action for the decreased property value due to the debilitating effects of the condemnation announcements after the property had been taken.

At the outset the Court notes that the actions of the municipality did not constitute condemnation blight. (*Klopping* 104 Cal. Rpt. at p. 5). The Court recognizes that before damages can be awarded a taking is required.

> "Plaintiffs seek to recover under inverse condemnation, one of the two basic procedural devices for insuring that the constitutional proscription that '(p)rivate property shall not be taken or damaged for public use without just compensation having first been made to . . . the owner . . .' is not violated. (Cal. Const. art. I §14.) The other procedure

is eminent domain, the significant difference being that in the latter the public authority takes the initiative whereas in the former it is the property owner who commences litigation." (*Klopping*, 704 Cal. Rpt. at p. 5).

The Court then goes on to cite with approval the decision in *City of Buffalo* v. *J.W. Clement Co.*, supra, and its recognition that a de facto taking requires a "physical invasion or direct legal restraint". (*Klopping* 104 Cal. Rpt. at 7).

The Court never decides whether there was a de facto taking in the case because plaintiffs were at a point in the litigation subsequent to a formal condemnation proceeding. The Court frames the issue thusly:

> ". . . a fundamental difference arises between the relief sought in de facto taking situations and that sought here. In the former the owner claims his property has been *taken* on the earlier date; (emphasis theirs) thus all decline in value after that date is chargeable to the condemnor. This would include damages wholly unrelated to the pre-condemnation activity of the public agency . . . . In the instant case, however, plaintiffs do not contend that the subject properties should be treated as if they were actually condemned on either May 11, 1965, or July 7, 1966 . . . . Rather plaintiffs submit that any decrease in market value caused by the pre-condemnation announcements should be disregarded and that the property should be valued without regard to the effect of the announcements on the property." (104 Cal. Rpt. at 7).

It is clear from this statement that the Court was simply concerned with the value to be placed on the property in the condemnation proceeding. The Court was persuaded that public policy demanded disclosure of impending condemnation and therefore tempered its ultimate decision by applying a rule of reasonableness on the part of the municipality. (104 Cal. Rptr. 11).

The Court held that where the condemnor acts unreasonably in issuing pre-condemnation statements or by other oppressive conduct, a claimant will be permitted to offer proof of the diminished value of the property due to these unreasonable activities. As such *Klopping* establishes a rule of evidence. It is

of some note that the rule in *Klopping* does not appear to go as far as that expressed by the New York Court of Appeals in *Clements* where the Court held when damages are assessed in the condemnation proceeding:

> ". . . The Claimants property should be evaluated . . . on its value except for such affirmative value-depressing acts of the appropriating sovereign. *Clements*, supra 28 N.Y.2d at 258."

From a review of the cases cited in support of Petitioners' position, there appears to be no authority to support their claim.

Respondents research would indicate that when other jurisdictions have been faced with similar claims, the Courts have unanimously rejected those claims.

In *Fram* v. *City of Boston*, 292 N.E.2d (1973) the Supreme Judicial Court of Massachusetts found the following facts alleged in plaintiff's complaint: his land was within a designated urban renewal area; following announcements of condemnation intentions many tenants vacated; the property was subject to being vandalized; all of which led to plaintiff's financial damage.

A motion to dismiss was sustained by the Trial Court and the Supreme Court affirmed. The Court first required there be a "taking" before damages could be awarded. The allegations of the complaint "clearly failed to show a taking in any sense". The Court further examined the policy behind its decision:

> "The circumstances surrounding urban renewal and urban redevelopment require advance planning and disclosure and public announcements of proposed action which results in decreases in property values are not by themselves compensable takings (292 N.E.2d at 359)."

In Pennsylvania the Commonwealth Court has stated:

> "The approval and funding of an urban renewal or redevelopment project by governmental authority followed by notices to and negotiations with affected property owners were not in themselves sufficient to establish a substantial interference with one's use and enjoyment of his property as to amount to a de facto 'taking' or compensable injury within the meaning of the Eminent Domain Code." *Conroy-Prugh*

Glass Co., v. *Commonwealth of Pa. Dept. of Transportation*, 298 A2d 672 (1972) citing *Hazelton Redevelopment Authority* v. *Hudock*, 281 A2d 914 (1971).

In New Jersey, the case of *New Jersey Sports & Exposition Authority* v. *McCrane*, 292 A2d 580 (Law Civ. 1971) Aff'd 61 N.J. 1, 292 A2d 545 (1972) held that the mere enactment of a statute and the stipulation by counsel as to the projected site for the complex do not constitute a "taking" of property in the constitutional sense. In *Wilson* v. *Long Branch*, 27 N.J. 360, 142 A2d 837 (1958) it was held that a declaration of blight does not itself constitute a "taking" for which compensation is required.

In *Empire Construction, Inc.* v. *City of Tulsa*, 512 P.2d 119 (Okl. 1973), the plaintiff alleged that his property would be condemned sometime in the future by the municipality. He further alleged that the City had precluded him from making any economically prudent productive use of the property and that by retention of the plan without implementation for such unreasonable length of time (10 years), the defendant City had frozen the property in a state of economic unproductivity and a "condemnation-related blight" which the plaintiff characterizes as an interference with its beneficial use and with its power of disposition, all of which constitutes a taking without just compensation contrary to the Oklahoma Constitution and the Fifth and Fourteenth Amendments of the United States Constitution. In reaching its decision the Oklahoma Supreme Court cited the *Clement* case, and recognized that the New York Court of Appeals had distinguished between a de facto taking and a condemnation blight. The Court utilized this distinction for the purposes of determining whether or not a constitutional taking had been shown and concluded that

> "Plaintiffs' petition as amended does not set forth facts sufficient to state a cause of action in inverse condemnation for the taking or damaging of its property under the Oklahoma Constitution and statutes, nor under the United States Constitution. (512 P.2d at 124)."

It is clear from the above cited cases that there is no trend in any of the jurisdictions to permit a cause of action based upon facts as alleged by the Petitioners herein.

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, FOURTH DEPARTMENT SHOULD BE DENIED.

Dated: June , 1975

Respectfully submitted,

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APPENDIX

Opinion of Appellate Division, Fourth Department, 46 A.D.2d 216, 361 N.Y.S.2d 773

Donald M. Fisher et al., Appellants, v. City of Syracuse and Syracuse Urban Renewal Agency, Respondents. Appeal No. 1.

Sidney Bluman, Individually and as Executor of the Last Will and Testament of Isabel Hurwitz, Deceased, Appellant, v. City of Syracuse and Syracuse Urban Renewal Agency, Respondents. Appeal No. 2.

Supreme Court, Appellate Division, Fourth Department.

Dec. 12, 1974.

Before:

Moule, *J.P.*, and
Cardamone, Simons, Mahoney and Goldman, *JJ.*

Per Curiam:

Appellants seek damages for the diminution in value of their properties and for the increased expense of maintaining them which they allege result from the acts of the City of Syracuse.

The properties are located within an area approved for urban renewal as a part of the City's General Neighborhood Renewal Plan. They were subsequently designated for acquisition by the Common Council. Although the plan was adopted more than 10 years ago, the properties have not been taken and it is claimed that substantial damage has resulted during the interim from this threat of condemnation. Special Term held that in the absence of a "taking" the appellants were not entitled to damages from

the City and dismissed the complaints for failure to state a cause of action (78 Misc.2d 124, 355 N.Y.S.2d 239). We affirm that decision (see Danforth v. United States, 308 U.S. 271, 60 S.Ct. 231, 84 L.Ed. 240; City of Buffalo v. Clement Co., 28 N.Y.2d 241, 321 N.Y.S.2d 345, 269 N.E.2d 895; and cf. opinion at the Appellate Division, 34 A.D.2d 24, 311 N.Y.S.2d 98). Furthermore, without an actual or *de facto* taking of the property the appellants are not entitled to be compensated for damages under the due process and equal protection clauses of the State and Federal Constitutions (see Sayre v. City of Cleveland, 6 Cir., 493 F.2d 64). The judgments should be affirmed.

Judgment affirmed without costs.

MOULE, *J.P.*, and CARDAMONE, SIMONS and MAHONEY, *JJ.*, concur.

GOLDMAN, *J.*, concurs in the following Opinion.

GOLDMAN, *Justice* (concurring):

I concur in affirmance but feel constrained to point out a a substantial wrong which has been visited upon appellants. The facts are not in dispute.

The properties owned by both plaintiffs are situated within a 101 block area within the City of Syracuse designated as the Syracuse Hill Neighborhood Development Program and there are over 1,600 individual parcels of land within the area. In 1962 the Syracuse Urban Renewal Agency, a Department of the City, commenced a comprehensive urban renewal study and made renewal plans for the area in question. The Common Council of the City approved an ordinance authorizing an application by the

City to the federal government for a planning grant for the urban renewal project. On September 12, 1966 the Common Council approved an initial partial acquisition of properties. On October 14, 1966 the City submitted a plan of acquisition for a portion of the renewal area, which plan included the property of appellant Bluman but did not include the property of appellants Fisher. Although the City has acquired title to many of the properties in the area, no proceeding has been commenced to condemn appellants' properties and no compensation has been paid to them.

Special Term found that:

> "It is undisputed that for more than ten years the above events and activities associated therewith were the subject of wide and frequent publicity in the news media in the City of Syracuse and were the subject of frequent correspondence and conferences between the parties in both of the above captioned actions."

In furtherance of the plan many buildings were demolished and others were boarded up in the immediate area where appellants' properties are located. Appellants brought these actions to recover damage for the diminution in property values because of the "condemnation blight" and also for the increased expense of maintaining the properties during this long period of activity by the City. Although there was no "taking", appellants contend that the refusal to grant them "just compensation" is a denial of due process and equal protection guaranteed by the Constitutions of the United States and the State of New York.

Special Term recognized the damages suffered by appellants and stated that the decision it must make was "harsh" in its effect on these property owners. Special Term felt bound, as we do, by Article I, section 7(a) of the State Constitution which specifically limits "just compensation" to property "taken". Our highest State court has clearly recognized this limitation in several decisions and particularly in City of Buffalo v. Clement Co., 28 N.Y.2d 241, 321 N.Y.S.2d 345, 358, 269 N.E.2d 895, 904. No good purpose can be served by citation of the numerous Supreme Court decisions which deal with the question of "just compensation". Danforth v. United States, 308 U.S. 271, 60 S.Ct. 231, 84 L.Ed. 240 is supportive for the determination by Special Term. That case succinctly presents the limitations which constitutionally restrict compensation for "taking" stating, at page 285, 60 S.Ct. at page 236, that "[a] reduction or increase in the value of property may occur by reason of legislation for or the beginning or completion of a project. Such changes in value are incidents of ownership. *They cannot be considered as a 'taking' in the constitutional sense*" (emphasis supplied). Special Term asserted that although it was "sympathetic to the plight of the plaintiffs • • • the principle of *damnum absque injuria* prevails". An eminent jurist of our State, Justice Howard T. Hogan, who has for many years presided almost exclusively over condemnation and appropriation cases, expressed my position on this principle when he wrote in Matter of County of Nassau [Lido Blvd.], 71 Misc.2d 554, 562 336 N.Y.S.2d 566, 575 that "[t]he doctrine of *damnum absque injuria* to me has always been an immoral, illogical concept and should be declared illegal". It is of little comfort to tell these appellants that, "notwithstanding the

agreed fact that the City has dragged its heels for an inordinately long time (now ten years and into the indefinite future), you have been damaged but that damage is without wrong. True, your properties are now in a vast waste land, without tenants, neither desirable for residential nor commercial use, deteriorating daily but, unfortunately, under the present state of the law you have no recourse". This was the basis of our decision in City of Buffalo v. Clement Co., 34 A.D.2d 24, 28-32, 311 N.Y.S.2d 98, 102-107, which the Court of Appeals held (28 N.Y.2d 241, 257, 321 N.Y.S.2d 345, 358, 269 N.E.2d 895, 904, *supra*) is not the law in this State.

The sole purpose for this writing is the hope that the Legislature will consider the dilemma of these property owners, and literally hundreds of others similarly affected during these days of urban renewal, and will adopt legislation recommending amendment of our State Constitution. Substantially more than half of our sister states, among which are such significant jurisdictions as California, Illinois, Massachusetts and Pennsylvania, now make provision for compensation for property "taken or damaged". The New York State Constitutional Convention of 1967 proposed a new Constitution which contained in Article 1, section 7(a) the provision that "[P]rivate property shall not be taken or damaged, as such latter term is defined by law, without just and timely compensation". Since the refusal of the electorate to adopt the new Constitution, the Legislature has been taking action on these provisions on which there is a consensus as to their desirability. I respectfully suggest to the Legislature that the subject of this opinion is a matter which should be given prompt and favorable consideration.

Judgment Appealed From—Fisher Case

STATE OF NEW YORK
SUPREME COURT

COUNTY OF ONONDAGA

Case #1

DONALD M. FISHER and MELVIN P. FISHER, as Trustees under the Last Will and Testament of BERNARD FISHER, Deceased; ROSLYN MILLER; BERNICE GOLD and PHILIP ADLER,

Plaintiffs,

—v.—

CITY OF SYRACUSE and SYRACUSE URBAN RENEWAL AGENCY,

Defendants.

A motion having been made by the defendants for judgment dismissing the complaint in the above-captioned action pursuant to CPLR 3211, and the motion having regularly come on to be heard at a Special Term of this court on the 15th day of January, 1974, and the defendants appearing by Harold T. Limpert, and the plaintiffs, appearing by Raphael, Searles, Vischi & Sackman, Julius L. Sackman, as counsel, and the motion having been granted and a memorandum decision dated March 27, 1974, directing that the complaint in the above entitled actions be dismissed and an order granting said motion having been filed and entered May 15, 1974,

Judgment Appealed From—Fisher Case

Now, on motion of Harold T. Limpert, attorney for the defendants, it is

ADJUDGED, that the defendants have judgment against the plaintiffs dismissing the complaint.

Judgment signed this 24 day
of May, 1974.

/s/ JAMES D. GORHAM
Acting Onondaga County Clerk

Judgment Appealed From—Bluman Case

STATE OF NEW YORK
SUPREME COURT

COUNTY OF ONONDAGA

Case #2

SIDNEY BLUMAN, Individually and as Executor of the Last Will and Testament of ISRAEL HURWITZ, Deceased,

Plaintiff,

—v.—

CITY OF SYRACUSE and SYRACUSE URBAN RENEWAL AGENCY,

Defendants.

A motion having been made by the defendants for judgment dismissing the complaint in the above-captioned action pursuant to CPLR 3211, and the motion having regularly come on to be heard at a Special Term of this court on the 15th day of January, 1974, and the defendants appearing by Harold T. Limpert, and the plaintiff appearing by Raphael, Searles, Vischi & Sackman, Julius L. Sackman, as counsel, and the motion having been granted and a memorandum decision dated March 27, 1974, directing that the complaint in the above-entitled actions be dismissed and an order granting said motion having been filed and entered May 15, 1974,

Now, on motion of Harold T. Limpert, attorney for the defendants, it is

Judgment Appealed From—Bluman Case

ADJUDGED, that the defendants have judgment against the plaintiff dismissing the complaint.

Judgment signed this 24 day
of May, 1974.

/s/ JAMES D. GORHAM
Acting Onondaga County Clerk

Opinion of Special Term, Onondaga County, 78 Misc.2d 124, 355 N.Y.S.2d 239

DONALD M. FISHER *et al., Plaintiffs* v. CITY OF SYRACUSE and Syracuse Urban Renewal Agency, *Defendants.*

SIDNEY BLUMAN, Individually and as Executor of the Last Will and Testament of Israel Hurwitz, Deceased, *Plaintiff* v. CITY OF SYRACUSE and Syracuse Urban Renewal Agency, *Defendants.*

Supreme Court, Onondaga County

March 27, 1974

WILLIAM R. ROY, *Justice.*

The defendants in each of the above entitled actions have moved, pursuant to C.P.L.R. 3211 to dismiss the complaints on the ground that they fail to state a cause of action. Since both cases involve common questions of law and fact, this Court will consider them together.

In considering these motions to dismiss, the Court will apply the rules of liberal construction of the pleadings; Walkovsky v. Carlton, 18 N.Y.2d 414, 276 N.Y.S.2d 585, 223 N.E.2d 6; C.P.L.R. 3026; the acceptance as true of the material allegations of fact contained in the complaints and the truth of any reasonable inferences that may be drawn therefrom; Garvin v. Garvin, 306 N.Y. 118, 116 N.E. 2d 73; and that if any cause of action can be spelled out from the facts alleged, the motion must be denied, Dulberg v. Mock, 1 N.Y.2d 54, 150 N.Y.S.2d 180, 133 N.E.2d 695.

The facts giving rise to the instant litigation are without dispute. The plaintiffs in each action claim to be owners or parties in interest to real property situated within a 101 block area within the City of Syracuse and known as the

Syracuse Hill Neighborhood Development Program. This is a designated urban renewal area and contains over 1,600 individual parcels of land.

Defendant, City of Syracuse, is the governing body and the Syracuse Urban Renewal Agency is the department delegated by the City to carry out the functions vested in the Agency which was established pursuant to Article 15A of the General Municipal Law of the State of New York.

A brief review of the history of the Syracuse Hill Neighborhood Development Program will be helpful in the determination of these motions.

Beginning in 1962 comprehensive urban renewal plans were commenced in the form of a general neighborhood renewal plan in the area in question.

In April of 1964 the Common Council of the City of Syracuse approved an ordinance authorizing City sponsorship of an application to the Federal Government for a planning grant in connection with the above urban renewal project and thereafter received such grant for the study. The properties owned by the plaintiffs in both of the above entitled actions were within the planning grant area.

On September 12, 1966, the Common Council of the City of Syracuse approved an initial partial acquisition for purposes of the plan.

On October 14, 1966, the City submitted a plan of acquisition for another part of the renewal area, which plan included the property of the plaintiffs, Bluman, in the second action. It is conceded that at no time was the property of the plaintiffs in the first action ever included within the plan.

In June 10, 1969, the Common Council of the City of Syracuse changed the project from General Neighborhood

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Renewal Plan to Neighborhood Development Plan and this was approved by the Common Council of the City on June 22, 1969. It is undisputed that for more than ten years the above events and activities associated therewith were the subject of wide and frequent publicity in the news media in the City of Syracuse and were the subject of frequent correspondence and conferences between the parties in both of the above captioned actions.

In implementing the foregoing plans and authorizations the defendants have acquired title to many parcels located within the urban renewal area and to several parcels in each of the blocks located within the City, in which the plaintiffs' properties are located. Many buildings have been demolished in furtherance of the plan and others have been boarded up.

The plaintiffs, feeling aggrieved as a result of the action of the City and the Agency, commenced these actions by a summons and complaint dated October 5, 1973.

In each of the complaints the history of ownership of the property is alleged and the activities of the City and the Agency as set forth above were outlined.

The complaints in each action contain similar allegations with respect to the activities of the City. Both of the complaints contain the following paragraphs:

> "As a result of the inordinately long and dilatory tactics of the defendants, the vicinity of the plaintiff's property has suffered a condemnation blight which has transformed the area into one which is highly undesirable for either residential or commercial purposes. The area has become a high-crime area, vandalism is rampant, and it is not safe to live or work there. Both

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> residential and commercial tenants have moved from the area, the plaintiff has lost substantial amounts of rental income, he has been placed in a special insurance pool which has forced him to pay excessive premiums, he has been compelled to expend monies to protect the property from vandalism, and his property has been drastically reduced in value."
>
> "By reason of the foregoing the plaintiff has been deprived of due process of law and of the equal protection of the laws, in violation of the Fourteenth Amendment of the United States Constitution and of Article I, Sections 6 and 11 of the New York State Constitution."

In the Bluman complaint there is an allegation that the property was designated for acquisition but that no proceedings were commenced to condemn the property, nor was any step taken to compensate the Blumans for the damage allegedly sustained by them.

The Fisher complaint contains an allegation to the effect that although their property was in the urban renewal area, no proceedings have been commenced to condemn the property nor has anything been done to compensate plaintiffs in that action for the damage allegedly suffered by them.

Thus, the only difference between the two actions is that in the Bluman case the property was designated for condemnation, but has not as yet been taken and in the Fisher case the property was not designated for condemnation.

It is the plaintiffs' contention, in both actions, and, as appears by the complaints, that as a result of the actions of the defendants, the vicinity of the plaintiffs' property

has suffered a "condemnation blight". This, they allege, has transformed the area into one which is highly undesirable for either residential or commercial purposes; it has become a high crime rate area where vandalism is rampant and where it is not safe to live or work. Plaintiffs further allege that tenants have moved from the area, resulting in loss of rental income. Further, plaintiffs claim that they have been forced to pay excessive insurance premiums and that they have been compelled to expend monies for the protection of their property from vandalism and that the properties have been reduced in value.

The plaintiffs contend that they should be compensated, because of the so-called condemnation blight, for loss of income from the properties, depreciation in value, and additional costs incurred in protecting the property from vandalism, as well as increased insurance premiums. They contend that the actions of the defendants amount to a constitutional deprivation of due process and equal protection of the laws pursuant to the Fifth and Fourteenth Amendments of the United States Constitution.

It is important to point out that in both of these actions the plaintiffs are not claiming that the defendants have *taken* their property, either by *de jure* or *de facto* (inverse) condemnation. Nor do they seek to compel the defendant to condemn the properties. As this Court reads the complaints, the plaintiffs claim that they should be compensated for damages sustained by them as a result of the activities of the defendants in creating what is referred to as a "condemnation blight" in the vicinity of their properties.

In order to understand and properly evaluate the complaints of the plaintiffs, it is necessary to examine the law in connection with condemnation and appropriation. As

was stated in City of Buffalo v. J. W. Clement Co., 28 N.Y.2d 241 at pg. 255, 321 N.Y.S.2d 345 at pg. 357, 269 N.E.2d 895 at pg. 903, ". . . 'condemnation blight' relates to the impact of certain acts upon the value of the subject property. It in no way imports a *taking* in the constitutional sense, but merely permits of a more realistic valuation of the condemned property in the subsequent *de jure* proceeding." It thus can be seen that condemnation blight is not a cause of action, but in reality is a rule of evidence of valuation of real property that has been the subject of a taking in condemnation, *de jure* or *de facto*.

The Fifth Amendment to the U.S. Constitution provides, as pertinent to this decision, ". . . nor shall private property be taken for public use without just compensation."

The Fourteenth Amendment, so far as is pertinent to this decision provides, ". . . nor shall any State deprive any person of life, liberty or property, without due process; . . .". Article 1, § 6 of the New York State Constitution provides, as far as is pertinent to this decision, as follows: ". . . no person shall be deprived of life, liberty or property without due process of law."

It is in light of these provisions of the Federal and State Constitutions and upon the case law that we must determine whether the actions of the defendants, although concededly not constituting a "taking" of property in its accepted legal sense, i.e., *de facto* or *de jure* appropriation, give rise to a cause of action for diminution in property values and increase in costs of maintenance and protection of those properties.

The Fifth Amendment provides the basis for compensation for property taken for public use. This provision refers only to direct appropriations. Laycock v. Kenney,

9 Cir., 270 F.2d 580, cert. den. 361 U.S. 933, 80 S.Ct. 373, 4 L.Ed.2d 355 (1960), and was never supposed to have any bearing upon or inhibit laws that indirectly work harm and loss to individuals. Knox v. Lee, 79 U.S. 457, 20 L.Ed. 287 (1870).

Furthermore, as was stated in Danforth v. United States, 308 U.S. 271 at pg. 285, 60 S.Ct. 231 at pg. 236, L.Ed. 240 (1939), ". . . a reduction or increase in the value of property may occur by reason of legislation for or the beginning or a project. Such changes in value are incidents of ownership. They cannot be considered as a 'taking' in the constitutional sense."

It thus can be seen that under the Federal law the actions of the defendants do not amount to a "taking". Inasmuch as these acts do not amount to a "taking", under the Federal law, then there can be no deprivation of constitutional due process. Danforth v. United States, *supra.*

In the landmark New York case of City of Buffalo v. Clement Co., *supra,* 28 N.Y.2d at pg. 257, 321 N.Y.S. at pg. 359, 269 N.E.2d at pg. 904, Judge Scileppi, after a review of authorities, stated the policy of the State of New York is:

> ". . . to deny recovery in the absence of a substantial impairment of claimant's right to use or enjoy the property at any time prior to the date of final appropriation. Accordingly, the mere announcement of impending condemnations, coupled as it may well be with substantial delay and damage, does not, in the absence of other acts which may be translated into an exercise of dominion and control by the condemning authority, constitute a taking so as to warrant awarding compensation."

In addition, the Court of Appeals of the State of New York has previously stated: "But acts done in the proper exercise of governmental powers, and not directly encroaching upon private property, though their consequences may impair its use, are universally held not to be a taking within the meaning of the constitutional provision. They do not entitle the owner of such property to compensation . . . or give him any right of action." Sauer v. City of New York, 180 N.Y. 27, 32-33, 72 N.E. 579, 580, aff'd 206 U.S. 536, 27 S.Ct. 686, 51 L.Ed. 1176.

Assuming the allegations of the complaints to be true, there is no question that the plaintiffs in each of the above entitled actions have suffered damages. It may very well be that the damages that the plaintiffs would be able to prove might far exceed the fair market value of the properties to which the owners might be entitled in condemnation proceedings. However, the mere fact that someone has suffered damage does not give rise to a cause of action, unless the cause of action has a legal basis. The items of damages alleged by the plaintiffs were not actually taken by the defendants. They are not "property" within the contemplation of the eminent domain clauses of the Federal or State Constitutions.

This Court is unable to find any case, Federal or State, which supports the theory upon which plaintiffs base their cause of action.

Plaintiffs, in their brief, cite the case of Luber v. Milwaukee County, 47 Wis.2d 271, 177 N.W.2d 380 (1970), in support of their position. That case involved the interpretation of a Statute which purported to limit the amount of rental loss which might be recovered in a condemnation case. The Court held in that case that the Statute was un-

constitutional insofar as it limited compensation for rental loss, stating that " . . . one's interest in rental loss is such as is required to be compensated under the 'just compensation' clause of Article 1, sec. 13, Wis.Const. sec. 32.19(4), Stats. . . .".

What the Court was determining in that case was that once you have determined what is "just compensation", any attempt to limit that "just compensation" would be unconstitutional.

The other cases cited by the plaintiffs in their brief involve instances of either *de jure* or *de facto* appropriation and did not involve the precise question here presented for determination by this Court. The case of Levine v. City of New Haven, 30 Conn.Sup. 13, 294 A.2d 644 (1972), cited by the defendant, involved a complaint which the Court determined to be one for inverse condemnation (a *de facto* taking). The case thus involved the question of whether the acts of the City of New Haven constituted a "taking" in the constitutional sense. That case differs from the above captioned cases in that there is no claim by either plaintiff that the acts of the defendants constitute a "taking".

It might be pointed out that once it has been determined that a "taking" has occurred, then all of the rights of the plaintiffs to constitutional due process must be observed. This necessarily involves notice to the property owner and an opportunity for him to be heard on the question of "just compensation".

Prior to a determination that property has been taken within the constitutional sense, that is by a direct appropriation, Laycock v. Kenney, *supra,* be it *de jure* or *de facto,* there is no constitutional deprivation of due process.

Danforth v. United States, *supra;* City of Buffalo v. Clement Co., *supra.*

Although the Court is sympathetic to the plight of the plaintiffs in these cases, it finds no constitutional or case authority in support of the causes of action alleged in the complaints. As harsh as it may be, the principle of *damnum absque injuria* prevails, and the complaints in each of the above entitled actions are, accordingly, dismissed on the ground that they fail to state a cause of action.

Supreme Court, U. S.
FILED
SEP 2 1975
MICHAEL RODAK, JR., CLERK

In The

Supreme Court of the United States

October Term, 1974

No. 74-1506

DONALD M. FISHER and MELVIN P. FISHER, as Trustees under the Last Will and Testament of BERNARD FISHER, deceased, ROSLYN MILLER, BERNICE GOLD and PHILIP ADLER,

Petitioners,

v.

CITY OF SYRACUSE and SYRACUSE URBAN RENEWAL AGENCY,

Respondents.

SIDNEY BLUMAN, individually and as Executor of the Last Will and Testament of ISRAEL HURWITZ, deceased,

Petitioner,

v.

CITY OF SYRACUSE and SYRACUSE URBAN RENEWAL AGENCY,

Respondents.

SUPPLEMENTAL BRIEF FOR WRIT OF CERTIORARI TO THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK. FOURTH DEPARTMENT

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—

Statement

The petition for a writ of certiorari in the above-entitled cases was docketed in this Court on May 29, 1975 as No. 74-1506.

The respondents served and filed their brief in opposition to the petition in June, 1975.

The instant case is now pending in this Court.

On July 28, 1975 the Supreme Court of New Jersey rendered a decision in a case entitled *Washington Market Enterprises, Inc.* v. *The City of Trenton*. On virtually an identical set of facts as those in the case at bar the New Jersey Supreme Court reached a decision diametrically opposed to the New York decision of which review is herein sought. Obviously, this decision was not available to the petitioners at the time of their last filing in this Court and, therefore, this supplemental brief is respectfully submitted pursuant to Rule 24 (5) of the Rules of this Court.

SUPPLEMENTAL ARGUMENT

In our petition herein it was conceded that there had been no "taking" in the traditional sense of the term in that in New York it had been held that, absent a physical interference with property or a legal restraint of the use thereof, there was no "taking". It was and is our contention that the impact of condemnation blight, in that it impaired the beneficial use of the property and destroyed its value, constitutes a violation of the due process guaranteed under the Fourteenth Amendment.

Since the filing of our petition and the filing of the respondents' brief in opposition the New Jersey Supreme Court decided a case — *Washington Market Enterprises, Inc.* v. *The City of Trenton* (July 28, 1975; unreported as yet) on facts which were identical with the case at bar. The Court found in favor of the property-owner on the law.

The Court stated the question before it as follows (Slip opinion, page 2):

> "This case presents the question of whether there can be a taking of property for which the Constitution demands just compensation, absent a physical invasion of the property or a direct legal restraint on its use."

In its brief the plaintiff had argued "that there has been a constructive taking under the Fourteenth Amendment of the United States Constitution." In agreeing with plaintiff's contention, the Court concluded as follows (Slip opinion, p. 3):

> "For reasons hereinafter set forth, we hold that where planning for urban redevelopment is clearly shown to have had such a severe impact as substantially to destroy the beneficial use which a landowner has made of his property, then there has been a 'taking of property' *within the meaning of that constitutional phrase.*" (Emphasis added.)

It is submitted that that is the answer that should be given to the "Question Presented" herein (Petition, pp. 2-3).

The New Jersey court observed that, although a declaration of blight does not obligate a municipality to complete fully all aspects of its renewal plan, if it abandons a project in whole or in part, it does not thereby insulate itself from the obligation to compensate in those instances where its activities have already practically destroyed the beneficial use of a particular property (Slip opinion, pp. 11-12). The court said that, while "not every impairment of value establishes a taking," it is not true "that there can be no *de facto* taking absent a physical invasion or a direct restraint on use" (Slip opinion, p. 12). The court reasoned (Slip opinion, pp. 14-15):

> "It was early held that actual appropriation or invasion might be deemed a compensable taking, although unrelated to any condemnation proceeding, * * * (citations omitted). From such cases there developed the idea of physical invasion or appropriation as the chief criterion for determining whether a 'taking' had occurred. While the physical invasion standard has proven useful in singling out those occasions where compensation should clearly be forthcoming, *it is obviously too narrow a standard to identify all instances of compensable taking.*" (Emphasis added.)

The court noted the departures from the physical invasion test in the cases dealing with direct restraints on the use of property and with the cases dealing with damage by reason of the low flight of aircraft whether directly below the flight path or proximate thereto (Slip opinion, pp. 15-18). The court considered the blight cases as yet another instance of departure from the physical invasion test. The court said (Slip opinion, pp. 18-19):

> "A declaration of blight is one of the early steps in an urban renewal project. Experience had shown that there is generally a considerable interval of time between such an announcement and the eventual acquisition — whether by purchase or condemnation — of property located in the blighted area. Occasionally, as was the case here, the project will be entirely abandoned before completion. From the time it becomes generally known that an area has been selected as the site of an urban renewal project, as we have pointed out in earlier cases cited above, there ceases to be a ready market for premises within the area. It becomes difficult to find tenants and impossible to enter into long-term leases. Upkeep, maintenance and renovation cease; the value of the property tends constantly to diminish."

The court concluded (Slip opinion, p. 22):

> "We hold that where the threat of condemnation has had such a substantial effect as to destroy the beneficial use that a landowner has made of his property, then there has been a taking of property within the meaning of the Constitution."

Although the court refused to direct the City to condemn the plaintiff's property, it remanded the case to the lower court for the factual determination of the damages.

Thus we have a determination of the New Jersey court in the cited case which is diametrically opposed to the determination of the New York court in the case at bar. In the instant proceeding we seek a writ of certiorari to review the New York determination. We understand that in the New Jersey case the defendant, the City of Trenton, is considering the advisability of applying to this Court for a writ of certiorari.

The question of law involved is arising in State after State. Wisconsin spoke first; California followed; and now comes New Jersey. It seems clear that this Court should pronounce its definitive ruling on this point, especially in view of the fact that vast Federal sums are involved in urban renewal projects throughout the country.

CONCLUSION

For the reasons stated in the petition and in this supplemental brief, a writ of certiorari should issue to review the judgment and opinion of the Appellate Division of the Supreme Court of the State of New York, Fourth Department.

Respectfully submitted,

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APPENDIX

Opinion of Supreme Court of New Jersey, rendered July 28, 1975 in *Washington Market Enterprises, Inc.* v. *The City of Trenton* (not as yet reported).

SUPREME COURT OF NEW JERSEY
A-30 September Term 1974

WASHINGTON MARKET ENTERPRISES, INC., a New Jersey corporation,

Appellant,

v.

THE CITY OF TRENTON, a municipal corporation of the State of New Jersey,

Respondent.

Argued January 7, 1975. Decided July 28, 1975.

On appeal from Judgment of the Superior Court, Law Division, Mercer County.

Mr. Frederick J. Schragger argued the cause for appellant (*Messrs. Schragger, Schragger and Lavine*, attorneys; *Mr. Raymond L. Nagy*, on the brief).

Mr. Ronald Berman argued the cause for respondent (*Messrs. Warren, Goldberg and Berman*, attorneys).

Mr. Richard L. Rudin, Deputy Attorney General, argued the cause as *amicus curiae* (*Mr. William F. Hyland*, Attorney General of New Jersey, attorney; *Mr. Stephen Skillman*, Assistant Attorney General, of counsel; *Mr. Rudin*, on the brief).

The opinion of the Court was delivered by MOUNTAIN, J.

This case presents the question of whether there can be a taking of property for which the Constitution demands just compensation, absent a physical invasion of the property or a

direct legal restraint on its use. The suit arises out of the activities of the City of Trenton in first undertaking and then abandoning an urban redevelopment project for the business district of central Trenton. Plaintiff alleges that these activities resulted in the substantial destruction of the value of its property. It seeks to compel condemnation, or in the alternative, to be recompensed by way of damages for loss of value. At the trial level, defendant's motion for summary judgment was successful. We granted direct certification of plaintiff's appeal, *R.* 2:12-2, because of the importance of the issue presented.

The premises in question consist of a parcel of land upon which has been erected a large building designed for commercial use. Allegedly, what had been tenantable office and retail space is now largely vacant. It is contended that this is attributable, wholly or in large part, to the action taken by the City.

For reasons hereinafter set forth, we hold that where planning for urban redevelopment is clearly shown to have had such a severe impact as substantially to destroy the beneficial use which a landowner has made of his property, then there has been a "taking of property" within the meaning of that constitutional phrase.

I

As the matter is before us on appeal from a grant of summary judgment awarded the defendant, we must accept as true all record facts and reasonable inferences therefrom in the light most favorable to the plaintiff. *Judson v. People's Bank and Trust Co. of Westfield*, 17 *N.J.* 67 (1954).

In 1958 Trenton undertook a feasibility study for the redevelopment of a considerable part of the downtown area of

the municipality. From the very beginning a large shopping mall was planned which would require, were the project to come to fruition, the condemnation of plaintiff's property. After considerable study the city decided to proceed first with a smaller undertaking (the Fitch Way Project) immediately to the south of the planned mall area. The land for the Fitch Way Project was acquired and buildings thereon razed in 1963. In 1964 a public hearing was held on the question of whether the proposed mall area (now designated as the Center City South Project) should be declared "blighted," this being the first formal step looking to ultimate acquisition. For reasons not of record no declaration of blight was forthcoming at that time (apparently the City was experiencing difficulties in developing the Fitch Way Project). During this period and the ensuing years there were repeated newspaper accounts of the progress being made toward the creation of the proposed mall and officials of the City were making public statements describing the plans which had been made with respect thereto.

In 1967 another public hearing was held, and in September of that year the land encompassing the Center City South Project (including plaintiff's property) was declared a blighted area. Before the City moved to acquire the land, the Department of Housing and Urban Development of the federal government altered the designation of the project from a conventional Urban Renewal Program to a Neighborhood Redevelopment Program. The change meant that instead of receiving a block grant to acquire all of the properties at one time, the City would receive smaller grants in each of several successive years and only gradually come to acquire the entire tract. In the ordinary course plaintiff's property would have been one of the last taken, as it was large and in relatively good condition. The program continued for three years after the change mentioned above.

During this time half of the properties in the project area were acquired by the City. In May of 1973 Trenton finally concluded that its redevelopment priorities lay elsewhere and notified the remaining property owners (including plaintiff) that the project was to be abandoned and that their lands would not be taken.

Plaintiff alleges that beginning in 1963 tenants began moving out in direct response to the threatened condemnation.[1] After 1963 it was impossible to find a long-term tenant interested in the building. The space was finally rented to two temporary tenants whose rent barely met the expense of upkeep. After the declaration of blight in 1967 the area surrounding plaintiff's property markedly deteriorated and several buildings in the area were boarded up. Many neighboring properties were purchased or condemned. In 1972 the temporary tenants vacated and thereafter the building was for the most part vacant.[2] Premises which had been generating $160,000 annually in 1963, were yielding $6,300 in rent in 1973.[3]

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[1]Actually plaintiff concedes, as it must, that its principal tenant, the Department of Labor and Industry of the State of New Jersey, moved out because its new building had been completed. However, plaintiff also alleges that other New Jersey agencies, including the Department of State, were very interested in space until learning that the property was scheduled for redevelopment acquisition.

[2]A small branch bank remains. Part of the building has been rented for warehouse space.

[3]The annual insurance charge against the building was $9,500 and the property taxes annually amounted to $30,000. The premises have been sold for taxes.

II

The trial court, in deciding the motion for summary judgment, relied upon a section of the Blighted Area Act, *N. J. S. A.* 40:55-21.10, and upon our decisions in *Wilson v. City of Long Branch*, 27 *N. J.* 360, *cert. denied*, 358 *U. S.* 873, 3 *L. Ed.* 2d 104 (1958); *Lyons v. City of Camden*, 52 *N. J.* 89 (1968); and *Jersey City Redevelopment Agency v. Kugler*, 58 *N. J.* 374 (1971). The trial judge concluded that under New Jersey law there can be no taking absent a physical invasion or a direct legal restraint on use. He felt that this was a "harsh" rule and was "completely unfair"; nevertheless, he felt bound by these precedents and entered judgment for the defendant.

In *Wilson* the validity of the Blighted Area Act, *N. J. S. A.* 40:55-21.1 *et seq.* was challenged, largely on constitutional grounds. One of the arguments advanced was that the very act of filing a declaration of blight was a "taking of property" because it seriously impaired land values. We held that this was not a taking, saying:

> It is akin to the result which flows from municipal zoning. If some diminution in market value can be said to follow from a finding of blight inspired by the valid exercise of police power, it is *damnum absque injuria*. [*Id.* at 374]

We sustained the constitutionality of the statute.

In *Lyons*, homeowners challenged the propriety of including their properties within an area declared to be blighted. The thrust of their claims was that while most of the land covered by the declaration was doubtless blighted, the area where their properties were located was not. While upholding the action of the condemning agency, we expressed our sympathetic recognition of the plight of the landowner in these terms:

There can be no doubt that a declaration of blight ordinarily adversely affects the market value of property involved. This is unfortunate because in so many instances the physical taking of the property does not occur for a number of years. In the meantime the owner can only wait for that ultimate taking; there is usually no reasonable market otherwise open to him for sale of the property. Moreover, in the interim his good housekeeping incentive generally recedes and deterioration of the building sets in. The Legislature has recognized the difficulty and has partially rectified it by providing that when property previously declared blighted is condemned the value "shall be fixed and determined to be no less than the value as of the date of the declaration of blight * * *." *L.* 1967, *c.* 217, §1; *N.J.S.A.* 40:55-21.10.

> In fairness, it is not enough to assure the property owner that at some time, perhaps years hence, he will receive the market value of his property as of the date of the declaration of blight. Meanwhile, he and his family may well be imprisoned economically in the blighted area because he needs the capital invested in the blighted-area dwelling in order to purchase a new home elsewhere. Consequently, he must endure the deterioration that afflicts a neighborhood at an accelerated pace following a declaration of blight. In this contest, equitable considerations call for action by the public authority to effectuate the redevelopment plan with reasonable dispatch, at least to the extent of the financing necessary to acquire the land to be redeveloped. [*Id.* at 99]

In addition to directing the defendant to proceed expeditiously, we pointed out that if this were not done the plaintiff would be at liberty to apply to the Superior Court for such relief as the demands of justice might require.

In *Jersey City* a redevelopment authority attacked the constitutionality of the 1967 amendment to the Blighted Area Act.[4] The authority argued that the enactment was an unconstitutional invasion by the legislature of the judicial prerogative of establishing rules of just compensation. We held that the legislature was clearly empowered to establish rules of compensation and that these might exceed the constitutional minimum. Speaking of our earlier decision in *Wilson*, we said:

> We recognized as a practical matter that a declaration of blight caused a depreciation of the property involved, but we held that such diminution in value was not a taking in the constitutional sense. Since the redevelopment project might be abandoned by the municipality, it followed that no legally cognizable damage existed, at least until an *actual* taking occurred through exercise of the power of eminent domain. [*Id.* at 380-81; emphasis in the original]

While there is nothing in our opinion today inconsistent with the holding in *Jersey City*, we recognize that some of the foregoing language may seem not to accord with certain statements made below. To that extent what we say here should be deemed controlling. Actually, however, the above excerpt from our earlier opinion goes little further than to say that a declaration of blight, in and of itself, will not constitute a taking. It does not address itself to the situation here presented, where, in addition to the declaration of blight, other related activities together with the passage of time are said to have shorn property of literally all or most of its value. Nor should the quoted passage be read as

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[4] *L.* 1967, *c.* 217 amended the Blighted Area Act to provide that upon condemnation a property owner would receive by way of compensation for the taking, an amount not less than the value of the property on the date of the declaration of blight. The amendment is now found in *N. J. S. A.* 40:55-21.10.

saying that a taking requiring the payment of compensation can occur *only* as the result of an exercise of the power of eminent domain.

The language of the Blighted Area Act upon which the trial court placed reliance, reads as follows:

> If the determination is that an area is a blighted area, the governing body of the municipality may, but shall not be required to, acquire the real property. . . . [*N. J. S. A.* 40:55-21.10]

Were this a legislative attempt to fix or interpret the dimensions of the Just Compensation Clause we would accord the legislative view great weight in forming our own independent judgment. But this statute says no more than that a declaration of blight, in and of itself, does not require a municipality to complete fully all aspects of its proposed plan, including the ultimate acquisition of each piece of property in the blighted area. It may, at some point, decide to abandon the project. That is what has happened here. It does not follow, however, that abandonment of the project automatically insulates the public body which has had it in charge, from the obligation to make just compensation in those instances where its activities have already practically destroyed the beneficial use of a particular property.

The foregoing cases and this statute, considered singly or together, do not establish the proposition that there can be no *de facto* taking absent a physical invasion or a direct restraint on use. Rather they stand for the principle that not every impairment of value establishes a taking. The question of whether a total or substantial destruction of the beneficial use of property amounts to a taking in the constitutional sense was previously before this Court in *Board of Educ. of Morristown v. Palmer*, 46 *N. J.* 522 (1966), *rev'g as premature*, 88 *N. J. Super.* 378 (App.

Div. 1965). There we expressly reserved the issue we decide today.

III

The general question as to when governmental action amounts to a taking of property has always presented a vexing and thorny problem.[5] If there has been a taking, both Federal and State Constitutions require the payment of compensation: *U.S. Const. amend. V*; *N. J. Const. art. 1, ¶ 20.* If there has not been a taking, any loss that may have been suffered is *damnum absque injuria;* there has been a noncompensable governmental exercise of the police power.[6]

In partial taking cases, for instance in the construction of a highway, the landowner is entitled to be paid the value of the land taken, together with the diminution in value of the part that remains (severance value), *Village of Ridgewood v. Sreel Investment Corp.*, 28 *N. J.* 121, 125 (1958); *State v. Interpace Corp.*, 130 *N. J. Super.* 322, 329 (1974). Yet if no part of an

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[5] As Justice Holmes said in dissent in *Springer v. Government of the Philippine Islands*, 277 *U. S.* 189, 209-10, 72 *L. Ed.* 845, 852 (1928):

> The great ordinances of the Constitution do not establish and divide fields of black and white. Even the more specific of them are found to terminate in a penumbra shading gradually from one extreme to the other.

[6] Professor Michelman, in "Property, Utility, and Fairness: Comments on the Ethical Foundations of 'Just Compensation' Law," 80 *Harv. L. Rev.* 1165 (1967), has described our role as follows:

> [A] court assigned to differentiate among impacts which are and are not "takings" is essentially engaged in deciding when government may execute public programs while leaving associated costs disproportionately concentrated upon one or a few persons. [Id. at 1165]

adjoining property owner's land is taken, that neighbor will receive no compensation for the loss he may have suffered by virtue of his property now being close to a noisy expressway. *Beseman v. Pennsylvania R. R. Co.*, 50 *N. J. L.* 235 (Sup. Ct. 1888), *aff'd*, 52 *N. J. L.* 221 (E. & A. 1880). While the results of these rules are sometimes harsh and seemingly inconsistent, it must be borne in mind that they represent pragmatic legislative and judicial responses to practical problems rather than being products of refined logic. *See United States v. Reynolds*, 397 *U.S.* 14, 25 *L. Ed.* 2d 12 (1970).

It was early held that the actual appropriation or invasion might be deemed a compensable taking, although unrelated to any condemnation proceeding, *Pumpelly v. Green Bay and Mississippi Canal Co.*, 80 *U. S.* 166, 20 *L. Ed.* 557 (1872); *Glover v. Powell*, 10 *N. J. Eq.* 211 (Ch. 1854); *Sinnickson v. Johnson*, 17 *N. J. L.* 129 (Sup. Ct. 1839). From such cases there developed the idea of physical invasion or appropriation as the chief criterion for determining whether a "taking" had occurred. While the physical invasion standard has proven useful in singling out those occasions where compensation should clearly be forthcoming, it is obviously too narrow a standard to identify all instances of compensable taking. Such instances have been found where there had been no physical invasion, and indeed there have been rare occasions where despite physical invasion, no taking was found to have occurred, *National Bd. of YMCA v. United States*, 395 *U. S.* 85, 23 *L. Ed.* 2d 117 (1969).

The major departure from the physical invasion test is to be found in the cases dealing with direct restraints on the use of property. While the ultimate criterion for determining whether a taking has occurred in this context is still a subject of dispute,

e.g., Sax, "Takings, Private Property and Public Rights," 81 *Yale L. J.* 149 (1971), there is no doubt that land use restraints can amount to a taking of property, *Pennsylvania Coal Co. v. Mahon*, 260 *U. S.* 393, 67 *L. Ed.* 322 (1922) (Holmes, J.). We have held upon several occasions that depriving an owner of undeveloped land of all beneficial use of that land for a significant period of time was a "taking." *Lomarch Corp. v. Mayor of Englewood*, 51 *N. J.* 108 (1968); *Morris County Land Improvement Co. v. Township of Parsippany-Troy Hills*, 40 *N. J.* 539 (1963) (*but see AMG Associates v. Township of Springfield*, 65 *N. J.* 101, 112 (1974)); *Grosso v. Board of Adjustment of Millburn Tp.*, 137 *N. J. L.* 630 (Sup. Ct. 1948).

There is another context that has presented the issue anew as to whether there may be a taking without physical appropriation. The United States Supreme Court has held that low overflights of aircraft which make impossible the continuance of a business on premises adjoining an airport, *United States v. Causby*, 328 *U. S.* 256, 90 *L. Ed.* 1206 (1946), or render living conditions intolerable in a home so located, *Griggs v. Allegheny County*, 369 *U. S.* 84, 7 *L. Ed.* 2d 585 (1962) constitute compensable takings. Lower Federal courts have tended to limit these holdings to permit recovery only by property owners located directly below the flight path. *Batten v. United States*, 306 *F.* 2d 580, 583 (10th Cir. 1962), *cert. denied*, 371 *U. S.* 955, 9 *L. Ed.* 2d 502 (1963); *Avery v. United States*, 330 *F.* 2d 640, 645 (Ct. Cl. 1964); *Bellamy v. United States*, 235 *F. Supp.* 139, 140 (E. D. S. C. 1964); *Leavell v. United States*, 234 *F. Supp.* 734, 739 (E. D. S. C. 1964); *Neher v. United States*, 265 *F. Supp.* 210, 216 (D. Minn. 1967).[7] But several

[7] However, even in *Batten* the majority pointed out that the facts before the court did not disclose a destruction of use (at 585). *See also, Bellamy, supra*, at 140 and *Leavell, supra*, at 738.

state courts have rejected this narrow view and have allowed recovery upon the ground that there has been a taking, although the affected premises were close to, but not directly beneath, the flight path. *Alevizos v. Metropolitan Airports Comm'n. of Minneapolis & St. Paul*, 298 *Minn.* 471, 216 *N. W.* 2d 651 (1974); *Martin v. Port of Seattle*, 64 *Wash.* 2d 309, 391 *P.* 2d 540 (1964), *cert. denied*, 379 *U. S.* 989, 13 *L. Ed.* 2d 610 (1965); *Thornburg v. Port of Portland*, 233 *Ore.* 178, 376 *P.* 2d 100 (1962). As the court said in *Martin*,

> We are unable to accept the premise that recovery for interference with the use of land should depend upon anything as irrelevant as whether the wing tip of the aircraft passes through some fraction of an inch of the air-space directly above the plaintiff's land. [391 *P.* 2d at 545]

The case before us is yet another instance of a claim to compensation resting upon an alleged taking, where there is not, and will not be, any physical invasion of the plaintiff's land. It is asserted that the extensive loss of value which has been suffered is in large part attributable to the declaration of blight and to the related activities of the City of Trenton in and around the immediate vicinity of the property. This has had the effect, plaintiff argues, of substantially destroying the value of the property for the use to which it was adapted and to which it was being put.

A declaration of blight is one of the early steps in an urban renewal project. Experience had shown that there is generally a considerable interval of time between such an announcement and the eventual acquisition — whether by purchase or condemnation — of property located in the blighted area. Occasionally, as was the case here, the project will be entirely

abandoned before completion. From the time it becomes generally known that an area has been selected as the site of an urban renewal project, as we have pointed out in earlier cases cited above, there ceases to be a ready market for premises within the area. It becomes difficult to find tenants and impossible to enter into long-term leases. Upkeep, maintenance and renovation cease; the value of the property tends constantly to diminish.[8]

The statute adopted by our Legislature in 1967, to which reference is made above, decreed that a property owner would receive an award in condemnation no less than the value of his property on the date of the declaration of blight. This was an important legislative response to the problem, which had been identified and discussed in *Report of the Eminent Domain Revision Commission of New Jersey* 24-28 (1965). Where there eventually is a condemnation action resulting in an award to the landowner, the statute should go far to right what might otherwise be grave injustice. Here, however, there has been no condemnation action instituted by defendant. Hence the statute cannot help this plaintiff, or other property owners who may be similarly situated. This contrast between the unfortunate plight of the owner whose property has suffered the consequences of a declaration of blight, but has not been condemned, and the relatively fair treatment accorded a neighboring owner whose property has in fact been taken, strongly suggests that the treatment of the former has been arbitrary and unfair.

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[8]The problem has been noticed and discussed. *E.g.*, Adams, "Eminent Domain, Police Power and Urban Renewal: Compensation for Interim Depreciation in Land Values," 7 *Ga. L. Rev.* 226 (1973); Comment, "Delay, Abandonment of Condemnation, and Just Compensation," 41 *So. Cal. L. Rev.* 862 (1968).

Courts have sought to meet the problem of condemnation blight in various ways. Many cases, while not finding any taking prior to a condemnation award or some form of physical appropriation, have nonetheless allowed the property owner to include the loss he has suffered in the determination of the damages to which he becomes ultimately entitled in eminent domain proceedings. *City of Buffalo v. J. W. Clement Co., Inc.*, 28 *N. Y.* 2d 241, 269 *N. E.* 2d 895 (1971), *noted in* 72 *Colum. L. Rev.* 772 (1972); *In re Elmwood Park Project, Sect. 1, Group B*, 376 *Mich.* 311, 136 *N. W.* 2d 896 (1965); *City of Cleveland v. Carcione*, 118 *Ohio App.* 525, 190 *N. E.* 2d 52 (1963); *Cleveland v. Hurwitz*, 249 *N. E.* 2d 562 (Ohio Probate 1969). But some courts have found, or have indicated a willingness to find, a compensable taking in this type of case, even though there has been no physical invasion nor any condemnation award. In *Foster v. City of Detroit*, 254 *F. Supp.* 655 (E. D. Mich. 1966), *aff'd*, 405 *F.* 2d 138 (6th Cir. 1968), condemnation proceedings were commenced in 1950 only to be abandoned in 1960. A second proceeding, commenced a few years later, fixed the value of plaintiff's property as of the initiation of the second action. The court concluded that this did not constitute fair compensation. It said,

> [T]his court now holds that the actions of the defendant which substantially contributed to and accelerated the decline in value of plaintiffs' property constituted a "taking" of plaintiffs' property within the meaning of the Fifth Amendment, for which just compensation must be paid. [254 *F. Supp.* at 665-66]

The court further determined that the taking actually took place in December, 1954, by which time the activities of the public agency had substantially destroyed the value of the property.

In *Howell Plaza, Inc. v. State Highway Comm'n.* 66 *Wis.* 2d 720, 226 *N. W.* 2d 185 (1975), although refusing to order inverse condemnation on the facts before it, the court nonetheless said:

> We have no doubt that there can be a cause of action for inverse condemnation if the facts alleged are sufficient to show that property owners so situated [in the path of a proposed freeway] have been deprived of all, or substantially all, of the beneficial use of their property. [226 *N. W.* 2d at 189]

See also, Madison Realty Co. v. City of Detroit, 315 *F. Supp.* 367 (E. D. Mich. 1970). We hold that where the threat of condemnation has had such a substantial effect as to destroy the beneficial use that a landowner has made of his property, then there has been a taking of property within the meaning of the Constitution.[9]

Our own courts have forecast the rule we announce today. Judge (now Justice) Pashman's opinion in *East Rutherford Indus. Park, Inc. v. State*, 119 *N. J. Super.* 352, 371 (Law Div. 1972), and Judge Doan's opinion in *Freeman v. Paterson Redevelopment Agency*, 128 *N. J. Super.* 448, 456-57 (Law Div. 1974), although concluding that no relief was available on the particular facts presented, took pains to point out that in

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[9]Our holding appears narrow if compared with the California Supreme Court decision in *Klopping v. City of Whittier*, 8 *Cal.* 3d 39, 500 *P.* 2d 1345 (1972). That case held that a measurable decrease in market value due to an unreasonable delay on the part of the condemning authority is compensable. While not mentioned in *Klopping*, California's constitution provides that property shall not be "taken or damaged" without just compensation, *Cal. Const.*, art. I, §14. More than twenty state constitutions contain this "damaging" provision, Note, 26 *Stan. L. Rev.* 1439, 1439-40, (1974). *See generally* 3 *Nichols, Eminent Domain* §6.44, *et seq.* (3d ed. Sackman 1974).

those cases there had been no substantial destruction of beneficial use. In *Board of Educ. of Morristown v. Palmer*, 88 *N. J. Super.* 378 (App. Div. 1965), *rev'd as premature*, 46 *N. J.* 522 (1966), *noted in* 20 *Rutgers L. Rev.* 378 (1966), Judge Goldmann, speaking for the Appellate Division, reached a decision and laid down a doctrinal basis for its support, which are indistinguishable from what we do today.[10]

IV

As mentioned above, the plaintiff requests relief by way of an order directing the defendant to condemn its property, or in the alternative that it be awarded damages for its loss in value. Generally speaking, condemnation should be ordered only where eventual acquisition appears inevitable, *Conroy-Prugh Glass Co. v. Commonwealth*, 456 *Pa.* 384, 321 *A.* 2d 598 (1974), or where equitable considerations mandate that remedy. A private person is generally better able to develop and exploit a piece of real estate than is a municipality and as a matter of policy it is undesirable to remove ratables from the tax rolls. We think it inappropriate to grant this form of relief here.

If, however, the plaintiff is successful in its proofs, it should be entitled to damages. Upon remand the plaintiff will be

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[10] In that case the proposed construction of a state highway threatened to render useless for school purposes a tract of land in Morristown that was then devoted to school use. The opinion of the court said,

> If the beneficial use has indeed been destroyed, there will be no other choice but to move, at an alleged cost of some 2-2 1/2 million dollars. In such a case justice demands that the right to compensation as well as the amount thereof be determined by the effect of the proposed highway construction upon the school facilities, without regard to whether such construction involves a physical invasion of the property. [88 *N. J. Super.* at 390-91]

required to show that there has been substantial destruction of the value of its property and that defendant's activities have been a substantial factor in bringing this about. It will be part of its burden of proof to identify the approximate time that this occurred; this will become the date of taking. Plaintiff will then be called upon to establish what the property would have been then worth had there been no declaration of blight and had the ensuing and related activities of the defendant not occurred.[11] Finally, the value of the property as of the date the project was abandoned must be ascertained. This value should actually be determined as of a date somewhat subsequent to the date abandonment was announced so that the market's response to the lifting of the threat of condemnation can be better evaluated. Plaintiff will be entitled to the difference between these sums, with interest from the date of abandonment. It will also be entitled to interest on the value of its property determined as aforesaid as of the date of the hypothesized taking, calculated from that date to the date of the abandonment of the project, less the excess, if any, of rental receipts over actual disbursements made in maintaining the property for this period.

The judgment of the trial court is reversed and the cause remanded to that court for further proceedings consistent with this opinion.

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[11] Despite the hypothetical nature of this proof we feel that this approach leads to a more just result than to select a valuation date prior to the time when the City's activities began having an injurious impact. In a blighted area, property values can be expected to be declining, apart from the effect of the declaration of blight, and the city is not responsible for these losses.